SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 153

CITIES SERVICE GAS COMPANY,
Appellant,

vs.

PEERLESS OIL AND GAS COMPANY, CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

GLENN W. CLARK,
R. E. CULLISON,
JOE ROLSTON, JR.,
ROBERT R. McCRACKEN,
Counsel for Appellant.

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Statutes Cited

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32,994

CITIES SERVICE GAS COMPANY, A CORPORATION,
Plaintiff-in-Error,

vs.

PEERLESS OIL AND GAS COMPANY, A CORPORATION, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, AND TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION,
Defendants-in-Error;

PHILLIPS PETROLEUM COMPANY, a CORPORATION,
Defendant and Cross-Petitioner-in-Error

JURISDICTIONAL STATEMENT

Filed in Supreme Court of Oklahoma, May 19, 1950. Andy Payne, Clerk

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Pursuant to the provisions of subsisting Rule No. 12 of the Supreme Court of the United States, Cities Service Gas Company, a corporation, as Appellant, files this its separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the final

judgment, decree and decision of the Supreme Court of Oklahoma in the above-captioned cause, the highest court of the State of Oklahoma in which a decision could be had.

I

Basis upon Which It Is Contended That the United States Supreme Court Has Jurisdiction

The final judgment, decree and decision of the Supreme Court of Oklahoma upheld as valid two separate gas price-fixing orders of the Corporation Commission ~~of the~~ State of Oklahoma limited solely to the Guymon-Hugoton Gas Field in Texas County, Oklahoma and certain specified statutes of the State of Oklahoma upon which said Supreme Court decided each of said respective gas price-fixing orders was authorized and based, denying thereby the specific and timely contention of Appellant that each of said statutes and each of said orders, as construed and applied to Appellant and its operations as a natural gas company and a producer and purchaser of gas in said field under the undisputed and indisputable evidence in the record, were repugnant to, violated and contravened the due process, equal protection and commerce clauses of the Federal Constitution.

II

Statutory Provisions Believed to Sustain Jurisdiction

The statutory provision vesting the Supreme Court of the United States with jurisdiction of this appeal is Sec. 1257 of Tit. 28, United States Code Revised, the material parts thereof which provide:

> "Final Judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

III

The State Statutes and the Orders of the Corporation Commission of the State of Oklahoma Issued Thereunder, the Validity of Which Is Involved.

Order 19514 of the Corporation Commission of the State of Oklahoma, the validity of which has been sustained and affirmed by the final judgment, decree and decision of the Supreme Court of the State of Oklahoma as not being repugnant to the Constitution of the United States, is based upon and was issued, as decided by said Court, pursuant to delegated legislative power granted said Commission by virtue of 52 O. S. 1941, 239. Said Order 19514, omitting caption, formal parts, and findings of Commission, reads:

"ORDER

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no natural gas shall be taken out of the producing structures or formation in the Guymon Hugoton field in Texas County, Oklahoma, at a price at the well-head, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"2. This order shall be effective as of January 1st, 1947."

Said statute 52 O. S. 1941, 239 reads:

"§ 239. Common source of supply—Excess gas supply—Apportionment and regulation to prevent waste.—Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or cor-

poration, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, § 4."

Order 19515 of the Corporation Commission of the State of Oklahoma, the validity of which has been sustained and affirmed by the final judgment, decree and decision of the Supreme Court of the State of Oklahoma as not being repugnant to the Constitution of the United States, is based upon and was issued, as decided by said Court, pursuant to delegated power granted said Commission by virtue of 52 O. S. 1941, 233. Said Order 19515, omitting caption, formal parts and findings of the Commission, reads:

"ORDER

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas

ratably from applicant's well located in Section 8, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"2. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas ratably from applicant's well located in Section 5, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"3. That respondent shall pay to applicant for the natural gas so taken not less than 7¢ per thousand cubic feet of natural gas at the well head, measured at a pressure of 14.65 pounds absolute pressure per square inch.

"4. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, for a price, at the wellhead, of less than 7½¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"5. This order shall be effective as of January 1st, 1947."

Said statute 52 O. S. 1941, 233, reads:

"§ 233. Sale of gas—Prices and amounts of gas to be taken—Delivery.—Any person, firm or corporation, taking gas from a gas field, except for purpose of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that

each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. Laws 1913, ch. 198, p. 440, § 3."

In order that the Supreme Court of the United States may have a clearer picture of the case, Appellant appends to this Jurisdictional Statement a full, true, and complete ~~copy, including findings of~~ Commission, of each of said Orders 19514 and 19515, as well as a full, true and complete copy of Chap. 197, Laws of 1915, which comprises 52 O. S. 1941 Sections 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, and 247, and Chap. 198, Laws of 1913, which comprises 52 O. S. 1941, Sections 231, 232, 233, 234, and 235.

IV

Date of Judgment and Date of Application for Appeal Therefrom

The judgment, decree and decision herein appealed from was entered on the 17th day of January, 1950, (not yet officially reported), copy of which, together with dissenting opinions, is appended hereto.* Finality thereof was stayed by Appellant's timely filing within the time prescribed by Order of the Court and on February 18, 1950, of its Petition for Rehearing, which was denied, without opinion, by the Supreme Court of Oklahoma on March 21, 1950. Appellant's Petition for Appeal was presented and said appeal was allowed on May 19, 1950, within 90 days after the entry of such judgment, decree and decision sought to be reviewed and, hence, timely. (Sec. 2101, Tit. 28. United States Code, Revised).

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* (Clerk's Note.—The opinions are printed as appendices to the Statement as to Jurisdiction in *Phillips Petroleum Co.* v. *Oklahoma,* No. 73, October Term, 1950 and are not reprinted here.)

V

Nature of Case and the Rulings of the Oklahoma Supreme Court Bringing Case Within the Jurisdictional Provisions Relied On.

The proceedings before the Corporation Commission of the State of Oklahoma, hereinafter for convenience called "Commission," that gave rise to the issuance of said Orders 19514 and 19515 originated with the filing of a twofold application by Appellee Peerless Oil and Gas Company, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, hereinafter for convenience called "Peerless," against Appellant Cities Service Gas Company, a producer and purchaser of gas in said field and also a natural gas company (15 U. S. C. A. 717), owning and operating an interstate gas pipe line system, hereinafter for convenience called "Cities Service," requesting said Commission (a) to order Cities Service to make a connection with and purchase natural gas from a certain well of Peerless in said field at a price and upon terms to be fixed by said Commission and (b) to fix the price to be paid by all purchasers of natural gas generally in said field. Said application also alleged a written tender of gas from the Peerless well to Cities Service at a price of 6¢ per thousand cubic feet prior to the filing of the Peerless application. It was also alleged that "10¢ per thousand cubic feet of natural gas measured at atmospheric pressure is a reasonable price for natural gas in said field and that by fixing the price and measurement base for gas as alleged, said Commission would prevent waste of natural gas, conserve natural gas, and prevent use of natural gas for inferior purposes." The Peerless application further stated that Cities Service had signified its willingness to take the natural gas produced from its said well ratably with

natural gas taken from wells owned and operated by Cities Service and other wells in the field, but a dispute had arisen between Peerless and Cities Service as to the price to be paid for the natural gas so to be produced from the Peerless well.

Cities Service, by written answer, joined issues with the Peerless application, among other things, denying the jurisdiction and authority of Commission to grant Peerless the relief requested, because, inter alia, the granting of such relief would contravene the due process, equal protection, and commerce clauses of the Federal Constitution. Cities Service voluntarily offered to take and purchase gas from the Peerless well at the going price for natural gas in said field in harmony with subsisting orders of said Commission and in accordance with existing Oklahoma laws. Prior to trial and also as a part of its written answer Cities Service objected to a joint hearing of the judicial and legislative requests of Peerless, alleging that request of Peerless to fix the price and other terms of purchase concerning the purported dispute between it and Cities Service was judicial in character and required a private adversary hearing (*Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 53 L. Ed. 150) and that the request of Peerless to fix the price to be paid by all purchasers of natural gas in said field was legislative in character and required a public hearing (*Prentis* v. *Atlantic Coastline Co.*) and further alleged that the joining in one application and the granting by Commission of a joint hearing of legislative and judicial relief was contrary to the due process clause of the Federal Constitution and prejudicial to the rights of Cities Service in that it would not be accorded a fair opportunity to be heard, present its evidence and defenses and be given a fair, just and impartial hearing as required by law, which objection and request were overruled and denied by Commission. Cities

Service also, prior to trial, filed written motion requesting Commission in advance of its hearing of the Peerless application to inform it, in view of the specific recitations set forth in said motion, what rules of practice and procedure would be applied by Commission at the hearing of the Peerless application, which motion was denied.

After commencement of the hearing and trial between Peerless and Cities Service and during the course thereof, Commission in executive session at an ex parte hearing, by written order, granted the application of the State of Oklahoma on Relation of the Commissioners of the Land Office of the State of Oklahoma, hereinafter for convenience called "Land Office," to intervene in said cause and file petition in intervention therein requesting Commission to fix the price of gas in said field as in the sands and in the common reservoir before being removed, all of which was done without notice to Cities Service or an opportunity to it to oppose the granting of said application and the filing of said petition in intervention. Thereafter said Commission, by written notice, invited all producers and purchasers of gas in the field to appear and participate on a designated date, in a hearing upon the petition in intervention filed in said cause by Land Office and on said date proceeded to a hearing upon said petition in intervention, and at the same time and as a part thereof resumed the hearing between Peerless and Cities Service and allowed Land Office to actively participate in the trial of the combined judicial and legislative issues presented by the pleadings by permitting Land Office to introduce evidence, examine and cross-examine witnesses and made objections and legal arguments.

While the trial was in progress and evidence of Peerless was being received, said Commission allowed certain royalty owners, through their spokesman, to give testi-

mony, present a petition and make a speech to Commission without designating to what phase of the case it pertained. A plebiscite was conducted by said Commission and a great number of royalty owners present in the court room were polled as to the signing of said petition presented by their said spokesman and the desires of each royalty owner to increase the price of natural gas in said field. The Conservation Attorney of the Commission was permitted to participate actively in the hearing of said combined judicial and legislative cause by offering exhibits, advising Commission on the law and inquiring of and cross-examining witnesses, all of the aforesaid being done and permitted by Commission over objection of Cities Service. While the proceedings in said cause were still pending and undetermined, the Commission, through its Conservation Attorney, filed petitions in causes pending before the Federal Power Commission stating, among other things, that said Oklahoma Commission was materially interested in price paid for natural gas and interested in securing a greater purchase price for natural gas at the wellhead in said field. While the trial was still in progress and prior to the time Peerless rested its case, Peerless and Cities Service entered into a voluntary written stipulation for the ratable taking and purchasing of gas by Cities Service from two wells of Peerless in said field, including the well upon which its application to said Commission was based, at the price of 4½¢ per MCF delivered by Peerless into the pipe line system of Cities Service such payment to be without prejudice to a final determination of measurement and price then pending before said Commission in said cause.

At the time of the tender of gas from the Peerless well to Cities Service for purchase at 6¢ per MCF and at the time of the hearing of the Peerless application there was in full force and effect subsisting order 17867 of said Commission

governing said gas field which required that before a producer in said field was entitled to an allowance and to produce gas from its well it shall tender its gas production to a purchaser of gas, by registered mail, "at the going price in the field." The Supreme Court of Oklahoma has construed said subsisting order, — Okla. —, 200 P. 2d 758, (not yet officially reported), holding in the opinion that in order to have its acreage considered or held to be producing acreage, a producer was required to show by its tenders that it was in good faith willing to sell the gas from its wells at the going price in the field and that "going price has been held to be substantially the same as market price or current price." Said subsisting Commission order also required all purchasers, takers and producers of gas in the pool to comply with the common purchaser and ratable taking provisions of the Oklahoma statutes "by the equitable purchasing, producing and taking of all the gas without discrimination in favor of one producer as against another producer." There was also at said times in full force and effect Revised Maximum Price Regulation No. 436, promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended, (50 U. S. C. A. 901 *et seq.*), making it unlawful for any person to sell or deliver or pay or receive in the course of trade or business any natural gas at prices higher than the maximum price fixed by said Regulation and providing further that no person "shall agree, offer or attempt to do any of these things." The undisputed evidence showed that the going or prevailing price of wellhead gas sold to pipe line companies in the Hugoton Field, Texas County, Oklahoma, under said subsisting Maximum Price Regulation 436, was 4¢ per MCF. The undisputed evidence in the record shows that during all the times material and at issue herein the going price, market price, or weighted average price for natural gas in said field was not in excess

of $4\frac{1}{8}$¢ per MCF if sold at the wellhead and not in excess of $4\frac{1}{2}$¢ per MCF if sold on pipe line delivery in said field. The undisputed evidence in the record further showed no waste of gas in said field as defined or contemplated by the Oklahoma statutes was being committed or imminent; that correlative rights of producers, landowners and royalty owners in or to gas, as such, were and are being protected and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma statutes and subsisting orders of said Commission. The undisputed evidence in the record further shows that Cities Service was a substantial producer and purchaser of natural gas in said field; that 90% of all gas produced in said field and practically all of the gas produced and purchased in said field by Cities Service is immediately, without interruption, transported and sold in interstate commerce; that Cities Service was purchasing gas in said field under subsisting written gas purchase contracts which required the producer to produce and gather the gas and deliver the same, after being produced and gathered, to the pipeline system of Cities Service in said field at a price of $4\frac{1}{2}$¢ per MCF, the $\frac{1}{2}$¢ being for gathering, transporting and delivering of such gas. The undisputed evidence in the record discloses no facts which present a sound or substantial basis for limiting any price-fixing orders, if authorized, solely to the Guymon-Hugoton Gas Field to the exclusion of other Oklahoma gas fields.

The only issues as shown by the pleadings properly before the Commission at the combined hearing of the various applications were (a) the right of said Commission to fix a price for gas and, if it possessed that right, the price Cities Service should pay Peerless for the gas it voluntarily offered to take by purchase from the well of Peerless and (b) the right of said Commission to fix a price for gas and, if it possessed that right, the price that should be paid by all purchasers of gas in said field.

Said Commission on December 9, 1946, issued, simultaneously the two price-fixing orders in question, making both effective January 1, 1947. It is noted that said Commission in place of fixing the field price for purchased gas as requested by Peerless, if it possessed that right, attempted by its said order 19514 to fix the price at which gas could be produced in said field.

Cities Service within 60 days from the issuance of said order and well within the six months' period allowed by law for appeal to the Supreme Court of Oklahoma duly and timely appealed to said Court and by proper petition in error questioned the validity of each of said orders upon grounds including, among others, that each of said statutes and each of said orders as applied to Appellant violated the due process, equal protection, and commerce clauses of the Federal Constitution.

The Supreme Court of Oklahoma in its opinion and decision sets forth verbatim all of the legal propositions and specifications of error presented by Cities Service and decided that neither of said orders 19514 nor 19515 and neither of said statutes 52 O. S. 1941, 239, nor 52 O. S. 1941, 233, as construed and applied to Appellant by said Commission and the decision of the Supreme Court of Oklahoma, under the undisputed and indisputable evidence in the record, violated or contravened the due process, equal protection and commerce clauses of the United States Constitution and that each of said orders and the findings of the Commission therein were supported by substantial evidence and no errors of law was committed.

Specific excerpts from the record, pleadings, assignment of errors to the Oklahoma Supreme Court and the opinion and decision of said Court clearly demonstrating the appellate jurisdiction of the United States Supreme Court under Sec. 2101, Tit. 28, U. S. Code Revised, are hereinafter

quoted under subdivision VII of this Jurisdictional Statement.

VI

Stage in the Proceedings Before State Commission and in the Supreme Court of Oklahoma at Which and the Manner in Which Federal Questions Were Raised.

Appellant Cities Service Gas Company first raised the Federal issues and questions here involved by specific averments in its answer filed before the Oklahoma Corporation Commission and also in its demurrers, motions to dismiss, and motions for judgment and new trial filed with that body. Upon appeal to the Supreme Court of Oklahoma from said Commission's orders, Appellant in its specifications of error and legal propositions, which said Court copied verbatim in its opinion, assigned as error that said statutes 52 O. S. 1941, 239 and 233, and said orders 19514 and 19515 of Commission as construed and applied by the Commission were repugnant to and violated the due process, equal protection and commerce clauses of the Federal Constitution. After the Supreme Court of Oklahoma had decided said case and entered its judgment, decree and decision therein, Appellant renewed such assignment of errors in its petition for rehearing, specifically calling the attention of the Supreme Court to its contentions that said orders and said statutes as applied to the operations of Appellant violated and contravened said due process, equal protection and commerce clauses of the Federal Constitution. Such Federal issues were also expressly raised and discussed in Appellant's original and reply briefs to the Oklahoma Supreme Court and in its oral argument to that Court. Specific quotations from each of the foregoing documents showing precisely when and at what length Appellant raised the Federal issues before said Commission and before the Oklahoma

Supreme Court are given under subdivision VII of this statement.

VII

Manner and Way in Which Federal Questions Involved Were Raised and Passed upon by the Oklahoma Supreme Court and Excerpts from Record Showing Jurisdiction of the United States Supreme Court

In Appellant's Answer filed with said Commission the following, among other defenses, were interposed:

"I

"Respondent for its separate answer to that part of the application of Peerless Oil and Gas Company concerning the purported dispute between applicant and respondent over the taking and/or purchase of gas and the price and other terms of taking and/or purchase thereof, joined in this answer for convenience only, states:

* * * * * * *

"(10) For further answer and additional defense herein, respondent says that heretofore as a consequence of the national war emergency, the Congress of the United States passed the Emergency Price Control Act of January 30, 1942, same being 50 U. S. C. A. 901-946, inclusive. Under the provisions of this Act and the O. P. A. regulations promulgated pursuant thereto, which are now in full force and effect, the determination of the price of dry gas, being the kind of natural gas involved in this proceeding, has been confided to what is known as the Office of Price Administration. This functionary has issued what is known as Revised Maximum Price Regulation No. 436, and Amendments thereto, relating to and including natural gas and placing a maximum price upon the seller of gas in or from a gas field such as involved in this proceeding, and the attempt of applicant, as outlined in

this proceeding, and the attempt of applicant, as outlined in its said application, to procure an order from this Commission for respondent to take and/or purchase gas from applicant and pay applicant therefor the amount designated in its said application is in direct violation of said regulation. This Commission is without authority during the time said Emergency Price Control Act and Regulations promulgated pursuant thereto are in effect to take any action concerning the regulation of the price of dry gas as disclosed by the facts herein involved. The attempt on the part of this Commission to exercise any price-fixing power with relations to such dry gas would be entirely incompatible with the duties and powers of the Office of Price Administration under the Federal laws, since Congress has fully occupied this field by legal and constitutional authority and is fully exercising its powers with reference to the same. In addition thereto, and since in this particular instance the transaction and sale involved are one in interstate commerce and the transportation of natural gas in interstate commerce, any orders this Commission would make relating to, concerning, or regulating the price of dry gas or the terms of the contract for the sale or transportation thereof would be invalid and nugatory. In this connection, Paragraph 2 of Article VI of the Constitution of the United States, in part, provides:

"'This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding;'

"(11) For further answer and additional defense herein, respondent says that this case presents for consideration the following Statutes and Orders of the Commission, namely; Chapter 198 of the Laws of 1913, being 52 O. S. 1941, 231 to 235, inclusive; Chapter 99, Laws of 1913, being 52 O. S. 1941, 25 to 35, inclusive; Chapter 197, Laws of 1915, being 52 O. S. 1941, 236 to

247, inclusive, and Order No. 17867 of this Commission governing the Guymon-Hugoton Field.

"(a) Respondent alleges that Chapter 198 of the Laws of 1913 above referred to, in so far as the same attempts to confer upon this Commission authority to fix the price of gas and/or other terms of purchase or taking in the purported dispute between applicant and respondent, is unconstitutional and invalid, and contravenes Article IV and Section I of Article V of the Constitution of the State of Oklahoma, and is an unlawful delegation of legislative power to the Commission in that:

"(1) the Act prescribes no policy for the Commission to follow in fixing the price of gas and/or other terms of purchase or taking;

"(2) prescribes no standard, guide or rule for the Commission to follow in fixing the price of gas and/or other terms of purchase or taking, and

"(3) in effect, reposes an absolute, unregulated and undefined discretion in this Commission which amounts to a bestowal of arbitrary powers.

"(12) For further answer and additional defense herein, respondent says that, notwithstanding any of the statutes of Oklahoma or the rules and regulations of this Commission heretofore referred to, the attempt by this Commission to fix the price of gas or other terms of purchase and/or taking, or to grant the relief requested by Peerless Oil and Gas Company as set forth in its application would:

"(a) take respondent's property without due process of law;

* * * * * * *

"(e) deny respondent the equal protection of the laws;

"(f) deny respondent the enjoyment of the gains of its own industry;

* * * * * * *

"(l) unlawfully delegate legislative power to this Commission to write a special contract for private parties by fixing the price and other terms of purchase and/or taking of natural gas;

"(m) authorize this Commission in the same proceeding to exercise legislative and judicial power;

"(n) unlawfully authorize this Commission, without the promulgation of general rules, to regulate and fix the term, conditions, details, price, times of payment, quality of gas, excuses for non-performance, interruptability clauses, features protective against monetary standard, or general commodity index changes, minimums, maximums, dehydration, and other similar or dissimilar details and elements of a contract between private parties;.

and in contravention of the following provisions of the Constitution of the United States * * *, namely:

"The 14th Amendment, Constitution of the United States, that part reading as follows:

" 'No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"Section 8, Article ~~I, United~~ United States Constitution, reading in part as follows:

" 'The Congress shall have power * * * to regulate commerce * * * among the several states.'

"II

"Respondent for its separate answer to that part of the application of Peerless Oil and Gas Company requesting this Commission to fix the price of gas generally for all purchasers in the Guymon-Hugoton field, joined herein for convenience only, among other things and without waiving any other defenses herein or ob-

jections to the jurisdiction of the Commission which it may desire later to present at the hearing and its further right to be there heard, states:

"(1) Respondent makes all applicable defenses and objections heretofore set forth in 'I' hereof a part hereof as fully and completely as if here set out at length.

* * * * * * *

"(3) That if there was any statute in the State of Oklahoma purporting to authorize this Commission or any other body to fix the price of gas generally in the Guymon-Hugoton field, the same would be invalid and unconstitutional and beyond the police power of the State.

"(4) That as to gas produced in said field for transportation and sale in interstate commerce, this Commission has no jurisdiction to fix the price thereof because:

"(a) such action on the part of the Commission would cast a burden on, impede, and impair interstate commerce in contravention to the commerce clause of the Constitution of the United States of America, namely, Clause 3, Section 8, of Article I thereof;

* * * * * * *

"(c) such action would contravene the terms and provisions of Emergency Price Control Act of 1942, 50 U. S. C. A. 901-946, and O. P. A. Regulations promulgated pursuant thereto now in full force and effect.

"III

"Further answering herein, respondent objects to a joint hearing of the requests of applicant to (a) fix the price of gas and other terms of purchase concerning the purported dispute between Peerless Oil and Gas Company and Cities Service Gas Company and (b)

fix the price to be paid by all purchasers of natural gas in the Guymon-Hugoton field, and moves for a separate hearing on each of said matters for the following reasons:

"(1) The request of applicant to fix the price of gas and other terms of purchase concerning the purported dispute between Peerless Oil and Gas Company and Cities Service Gas Company is judicial in character, which requires a private adversary hearing.

"(2) The request of applicant to fix the price to be paid by all purchasers of natural gas in the Guymon-Hugoton field is legislative in character and requires a public hearing.

"(3) The joining in one application and the granting by Commission of a joint hearing thereon of legislative and judicial relief is (a) contrary to the due process clause of the Constitution of the State of Oklahoma and the United States of America and (b) prejudicial to the rights of Cities Service Gas Company in that respondent is not accorded a fair opportunity to be heard and present its evidence and defenses and is not accorded a fair, just, and impartial hearing as required by law (Okla. Sup. Ct. Tr. 49-75).

Appellant's demurrer to the evidence in the judicial phase of the case reads:

"Comes now respondent, Cities Service Gas Company, and insofar as the legislative question relating to fixing the price of gas and other terms of purchase from the Guymon-Hugoton Pool is concerned, demurs to all evidence introduced by applicant, intervener, and other parties adverse to the interest of respondent, and moves that the application of Peerless Oil and Gas Company, intervener, and all other parties interested adverse to respondent be dismissed and denied and that respondent be granted judgment upon the pleadings and the evidence in its favor for the reason and upon

the grounds that the Commission has no legal, statutory or constitutional authority to grant the relief prayed for and/or requested, and for all other legal and constitutional reasons set forth in respondent's answer, and for misjoinder of legislative and judicial issues" (Okla. Sup. Ct. Tr. 539).

Appellant's assignment of errors and legal propositions set forth verbatim in the opinion and decision of the Supreme Court of Oklahoma, in so far as here pertinent, read:

"2. 52 O. S. 1941, § 233, purporting to authorize Commission in case of dispute to fix price and other terms for taking or purchasing natural gas as between individual parties, is unconstitutional because:

"(a) It sets forth no policy or standard to guide Commission in acting thereunder (Articles IV and V, Oklahoma Constitution);

"(b) It violates the equal protection clause of the Federal Constitution (Section 1, Article XIV U. S. Constitution); and

"(c) It violates the due process clauses of the Oklahoma and Federal Constitution (Section 7, Article II, and 14th Amendment; as well as Sections 2 and 23, Article II, Oklahoma Constitution, and Section 59, Article V, Oklahoma Constitution.).

"3. If this Court should hold Commission under existing law is either expressly or impliedly granted natural gas price-fixing powers under some conceivable circumstances, the same are unconstitutional as applied herein because:

"(a) Price fixing has no reasonable relationship to waste, protection of correlative rights, or conservation of natural resources;

"(b) It casts a burden on, impedes and impairs interstate commerce in violation of the commerce clause of the Federal Constitution (Clause 3, Section 8, Article 1); and

"(c) It denies Cities due process and the equal protection of the law (14th Amendment, Oklahoma Constitution).

* * * * * * *

"(6) The orders of the Commission are void because of vagueness, indefiniteness, and uncertainty.

"(7) Commission erred in denying Cities' motions and demurrers;

* * * * * * *

"(b) Demurrer, motion to dismiss, and motion for judgment in judicial phase of the case;

"(c) Combined demurrer, motion to dismiss, and motion for judgment in the legislative phase of the case;

* * * * * * *

"(e) Motion for new trial in judicial phase of the case.

"(8) The findings and orders of Commission are not supported by substantial, competent evidence and are contrary to the undisputed evidence.

"(9) Commission failed to grant Cities a fair and impartial trial and hearing in accordance with the due process clauses of the Oklahoma and Federal Constitutions (Section 7, Article II, Bill of Rights, Oklahoma Constitution; Section 1, Article XIV, U. S. Constitution;

"(a) By refusing to inform Cities in advance of the trial of the case what rules of practice and procedure would be applied by Commission at the hearing thereof:

"(b) By allowing the misjoinder of judicial and legislative matters;

"(c) By erroneously consolidating judicial and legislative matters;

"(d) By erroneously allowing Land Office to file petition in intervention and intervene in the case;

"(e) By allowing a private citizen to make a statement and speech to the Commission during the course of the trial;

"(f) By conducting a plebiscite of land and royalty owners while case was in hearing;

"(g) By filing petitions with Federal Power Commission while trial was in progress stating Commission was interested in increasing price of natural gas;

"(h) By allowing Commission's conservation attorney to participate and take an active part in trial of private dispute between Peerless and Cities;

"(i) By admitting incompetent and hearsay evidence and testimony;

"(j) By refusing to segregate and separate the evidence of Peerless, Land Office and others at the close of their testimony so Cities could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case;

"(k) By Commission's refusing to recognize, apply, and abide by its own subsisting orders."

Finally, Appellant once again urged these propositions and errors upon the Supreme Court of Oklahoma in its Petition for Rehearing, wherein Appellant alleged:

"1. That this Court in deciding this case has failed to interpret the meaning and extent of said orders as applied to the operations of Cities and other purchasers and producers of gas in said Guymon-Hugoton Gas Field under the undisputed and indisputable facts in the record; that as a result the orders of Commission under this Court's opinion and decision are subject to many varying and contradictory interpretations, some of which are:

"(a) That Order No. 19514, under the opinion and decision of this Court as rendered herein is subject to

the interpretation that no natural gas shall be produced in the Guymon-Hugoton Gas Field by a producer unless such producer receives for the gas he may sell within the State of Oklahoma, whether the sale of such gas be made for delivery at the wellhead, at the pipe line of purchaser or elsewhere within the state, a price at the wellhead of not less than 7 cents per MCF measured at a pressure of 14.65 lb. absolute pressure per square inch, and that producers who were and are producing and gathering gas in said field and delivering same after production and gathering for sale under subsisting gas purchase contracts, at the pipe line of Cities or other purchasers of gas in the field, must either be paid for such gas a price at the wellhead of not less than 7 cents per MCF and upon the pressure base fixed by Commission's order or Commission can shut in said producer's wells and thereby interrupt and stop the flow of gas under said subsisting gas purchase contracts.

"That said opinion and decision of this Court is subject to the further interpretation that said order means that if a producer of gas in said field does not elect to sell his produced gas in Oklahoma he may, if he pays the production tax and his royalty owner on the basis fixed by the Commission's said order, transport such gas so produced outside the state and there sell or dispose of it at such price as such producer may determine, without further obligation under Commission's said order.

"On the other hand, said opinion and decision is subject to the interpretation that said order means that even if a producer does not sell his gas in Oklahoma but transports such gas so produced outside the state and there under subsisting contracts or new contracts sells or disposes of it, such producer must realize and receive from such sale or disposal at the wellhead of the produced gas a price of not less than 7 cents per MCF measured upon the pressure base fixed by Commission's said orders.

"Said opinion and decision is also subject to the interpretation that Order No. 19514 is only applicable to sales of gas made by a producer to a purchaser at the wellhead in said field and that it does not apply to the sales of gas where producer produces and gathers the gas and, after such production and gathering, sells and delivers such gas to the purchaser at the pipe line of purchaser in said field or elsewhere within the State of Oklahoma outside said field.

"(b) That Order No. 19515 under the opinion and decision of this Court requires Cities to take and purchase natural gas ratably from the designated wells of Peerless Oil and Gas Company, hereinafter called "Peerless," in said field but only for so long a time as it, Peerless, determines, and to pay Peerless therefor a price of not less than 7 cents per MCF for natural gas at the wellhead, measured at a pressure of 14.65 lb. absolute pressure per square inch; that at any time Peerless decides to dispose of its said gas elsewhere or to devote it to another use, it is at liberty to disconnect its said wells from Cities' pipe line system, stop the flow of gas therefrom and thereby impede and impair the service and operation of Cities' gas transportation system, Cities being required to take and purchase but Peerless not being required to deliver and sell, resulting in a unilateral and unjust arrangement lacking mutuality of obligation and therefore illegal.

"That Sec. 3, c. 198, Laws of 1913, being 52 O.S. 1941, Sec. 233, means, either when considered alone or with other statutes, that where a purchaser and a producer of gas in said Guymon-Hugoton Field or elsewhere within the State of Oklahoma have entered into a contract for the taking and purchasing of gas in said field upon such terms, including price, as the parties have theretofore agreed upon and the gas under said contract is being taken ratably, Commission has no jurisdiction or authority over either the parties or the subject matter nor the right to change or modify

the terms of said contract, including the price of gas agreed upon by the parties therein.

"That said Order 19515 under the opinion and decision of this Court is subject to the further interpretation that said order requires Cities to take gas ratably from Peerless' wells in accordance with the formula for ratable taking prescribed in Order No. 17867 of Commission, paragraph 9 of said order providing, among other things, that all purchasers of gas in the field shall comply with the common purchaser and ratable taking provisions of the Oklahoma Statutes by the equitable purchasing and taking of all gas without discrimination in favor of one producer as against another whether in price or amount; that Cities, prior to the issuance and effective date of said Order No. 19515, having entered into subsisting gas purchase contracts with producers in said field as authorized by 52 O.S. 1941, Sec. 233, upon terms, at a price, and upon a pressure base different from those fixed by Commission in its order, said Order No. 19515 requires Cities to discriminate in taking and purchasing the Peerless gas in favor of Peerless and against other producers from whom it purchases in violation of subsisting Order No. 17867 and the common purchaser statutes of Oklahoma and is therefore invalid. In this connection it is noted that Commission in its findings purporting to support said order found that Cities was a common purchaser of gas in Oklahoma. It must be conceded that the common purchaser acts of Oklahoma do not in themselves fix a price for the purchase of natural gas but only require a purchaser not to discriminate in favor of or against those from whom it purchases. If it is determined that Cities is a common purchaser of gas and Commission decides it is necessary to fix a price different from that which such common purchaser is paying under subsisting non-discriminating contracts, then Commission is required in advance of an attempt to exercise such authority, if it possesses that authority, to promulgate a general order applicable to all purchasers of gas in

the field setting forth with clarity and particularity the basic elements governing the purchase of such gas, as the common purchaser acts with respect to a change or increase in the price of gas currently being paid are not self-executing; Moore v. Vincent, 174 Okla. 339, 50 P. 2d 388; Wilcox Oil & Gas Co. v. State, 162 Okla. 89, 19 P. 2d 347; Maddox et al. v. Hunt et al. 183 Okla. 465, 83 P. 2d 553; Sec. 59, Art. V. Oklahoma Constitution. Commission in this case has promulgated no such general order. The only order Commission has promulgated with respect to increasing the price of purchased gas in said field over and above the amount currently being paid under subsisting non-discriminatory gas purchase contracts is No. 19515, which is a special order directed solely against Cities. Order No. 19514 is directed solely against producers as evidenced by plain and unambiguous language therein, notwithstanding that the application of Peerless itself expressly requested Commission to 'fix the price to be paid by all purchasers of natural gas in the Hugoton Oklahoma gas field,' and we quote the exact language of counsel, for Peerless who said, 'If the Commission please, if we hadn't asked that the price of gas in the field be fixed in this way, then we would have to tender the gas at what they say was the going price in the field, in which event we could never have gotten a price established in the field.' (R. 108)

"That by reason of the foregoing, said orders of Commission under the decision and opinion of this Court, as written, are so vague, indefinite and uncertain, so intermingle findings of fact and law and are subject to so many varying and contradictory interpretations that a producer or purchaser from a producer cannot in advance of production or purchase with clarity and particularity determine his rights, duties and obligations under said orders; that men of common and equal intelligence must and would therefore necessarily guess at the meaning thereof and differ as to the effect and application of said orders under the factual

situations reflected by the record under peril of dire penalties for an error in so guessing including, without limitation, contempt that such a situation as this violates the first essential of due process; Connally v. Gen. Constr. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. ed. 322-328; Asso. Industries v. Industrial Welfare Comm., 185 Okl. 177, 90 P. 2d 899.

"2. That the Court has overlooked, in deciding in this case that Commission Order No. 19515 is legislative in character and in upholding and sustaining same as valid and constitutional, the decision of the Supreme Court of the United States in the case of Prentis v. Atlantic Coastline Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150, wherein that Court defined a judicial inquiry and a legislative inquiry and clearly pointed out the difference between the two inquiries and wherein that eminent jurist Justice Holmes said:

"'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'

"This Court has further overlooked its own unreversed decisions wherein it has fully recognized the distinction between a judicial and legislative inquiry and accepted the definition of each as laid down by the Supreme Court of the United States in Prentis v. Atlantic Coastline Co., supra; see A. T. & S. F. Ry. Co. v. State, 23 Okl. 510, 101 P. 262; Asso. Industries v. Industrial Welfare Comm., 185 Okl. 177, 90 P. 2d 899; Skelly Oil Co. v. Corp. Comm., 183 Okl. 364, 82 P. 2d 1009; H. F. Wilcox Oil & Gas Co. v. State, 162 Okl. 89, 19 P. 2d 347; Russell v. Walker et al., 160 Okl. 145, 15 P. 2d 114; In Re County Commissioners, 22 Okl. 435, 98 P. 557. In connection with the foregoing it is the specific contention of Cities that the definition and

distinction between judicial and legislative inquiries as laid down by the Supreme Court of the United States in Prentis v. Atlantic Coastline Co., supra, with other cases of like import supporting same, are binding and conclusive on this Court in determining whether Cities has been accorded and given a fair and impartial trial or adversary hearing in accordance with the due process clause of the 14th Amendment to the United States Constitution.

"3. That in upholding, affirming and sustaining the validity and constitutionality of Commission's judicial Order No. 19515 and the statutes cited by this Court in support thereof, the Court has overlooked the provisions of Revised Maximum Price Regulation No. 436 (Cities' Ex. 80) promulgated under authority of Emergency Maximum Price Control Act of 1942, as amended, 50 U. S. C. A. 901 et seq., which act and regulation were in full force and effect at the time Peerless tendered gas from its said well or wells to Cities, as alleged and set forth in its said application, and at the time Commission commenced its hearing thereon, and in connection therewith the Court has further overlooked that at the time of such tender of gas by Peerless to Cities and at the time of the trial and hearing on said application before Commission there was in full force and effect Commission's subsisting Order No. 17867 (so recognized by Commission in its order) which provided in paragraph 4 (b) thereof that before any unconnected well shall be granted an allowable (Peerless' wells were unconnected at the time of tender) so that said well could lawfully be produced, the operator shall tender its gas production to a purchaser at the going price in the field (Application of Moran, —— Okl. ——, 200 P. 2d 758) and that the going price as determined by the Office of Price Administration under said subsisting regulation and price control act, as well as the actual going price in the field, was not in excess of 4 cents per MCF for dry wellhead gas to pipe lines in the Hugoton Field, Texas County, Oklahoma, and that

said order of Commission requiring a tender of gas by producer to the pipe line before the well is entitled to an allowable and to produce has been during all times material herein and is now in full force and effect.

* * * * * * *

"(6) That the Court has further overlooked in deciding this case that the language of the gas statutes mentioned, referred to and set forth in its said opinion upholding Order No. 19514 of Commission is not ambiguous and uncertain in meaning but is plain and concise and that by reason thereof under the well recognized rules of statutory construction there is no necessity of occasion for interpretation and this Court has no legal or constitutional authority to interpolate into the statutes language, matters and things not placed therein by the Legislature of Oklahoma; that said statutes deal with the production and conservation of gas, as gas, as a commodity and not to the price or proceeds thereof; that price is not even mentioned in any of the statutes relied upon by the Court in upholding Order 19514 and that under previous unreversed decisions of this Court neither this Court nor Commission can legally by judicial legislation read into a statute that which the Legislature has specifically omitted; Sterling Refg. Co. v. Walker, 165 Okl. 45, 25 P. 2d 312; Pannell v. Farmers Union Coop. Assn., 192 Okl. 652, 138 P. 2d 817; Wilcox Oil & Gas Co. v. Walker, 169 Okl. 33, 32 P. 2d 1044; Chicago R. I. & P. Ry. Co. v. State, 158 Okl. 57, 12 P. 2d 494; Y & Y Cab Service v. Okla. City, 157 Okl. 134, 28 P. 2d 5551; Worley v. French, 184 Okl. 116, 85 P. 2d 296; Appl. Central Airlines, Inc., 199 Okl. 300, 185 P. 2d 919; also Interstate Commerce Comm. v. Cinn. N. O. & T. P. R. Co., 167 U. S. 478, 17 S. Ct. 896-898, 42 L. Ed. 243; Sunshine Dairy v. Peterson, 193 P. 2d 543, and cases cited therein, together with other cases and decisions previously cited to the Court in Briefs heretofore filed by Cities.

* * * * * * *

"(8) The Court has overlooked in deciding this case that the testimony of experts and others in the record and referred to by the Court in its opinion and decision to the effect that 'taking gas from the field at prices of 3.6 cents to 5 cents per MCF constituted economic waste and that such prices were conducive of physical waste and that to prevent economic and physical waste the minimum price for gas in the field should be 10 cents per MCF,' and upon which in a large measure this Court bases its decision, is incompetent, irrelevant, immaterial and prejudicial to Cities and was objected and excepted to as such at the time it was received by Commission. That the Court has further overlooked in deciding this case that the undisputed and indisputable competent evidence in the record shows that no waste of gas as defined and contemplated by the Oklahoma Statutes was being committed, occurring or imminent in said field; that correlative rights of producers, landowners and royalty owners in or to gas, as gas, were and are being protected and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma statutes and subsisting orders of the Corporation Commission. That the Court has further overlooked in deciding this case that economic waste is not included within the definition of waste as set forth in any of the gas statutes of the State of Oklahoma; that even if the testimony relied upon and referred to by the Court in its opinion to the effect 'that to prevent economic and physical waste the minimum price for gas in the field should be 10 cents per MCF.' is competent, the order of Commission fixes a price of 7 cents and therefore if this Court is going to accept such evidence as the basis for its decision in upholding the orders to prevent waste of gas, the only logical conclusion is that Commission by fixing the price at 7 cents in the face of this testimony instead of preventing waste is permitting waste to occur and it necessarily follows that by accepting the testimony the orders as entered fixing a price of less than 10 cents have no relation to prevention of waste of gas as defined and contem-

plated by the Oklahoma Statutes. That the decree, judgment, decision and opinion of this Court, as well as the decree, judgment, decision and opinion of this Court, as well as the orders of said Commission, are contrary to the undisputed and indisputable evidence in the record which clearly reflects that the only real purpose of Commission's gas price-fixing orders was to increase the price of natural gas in order to confer special economic advantages on royalty owners and certain producers in said field and increase without legislative authority the gross production tax on gas in said field, to the great financial detriment of Cities, other gas pipe line companies operating in said field, and the gas consuming public in Oklahoma and elsewhere, and not for the purpose of preventing waste as contemplated by statute, protecting correlative rights as contemplated by statute, or protecting the public interest as contemplated by statute; that the end result is, under the undisputed and indisputable evidence in the record, a denial to Cities and other producers and purchasers of gas in the field of the equal protection of the law, due process of law, and the impairment of valid and subsisting gas purchase contracts and leases, all because the Commission thought the price of gas in said field was too cheap. In this connection attention is directed to the following cases:

"In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, it is said, on page 1024 Law Edition:

"The equal protection of the laws, which by the Fourteenth Amendment no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been observed, is a government of law and not a government of men and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must

in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

"See, also, Hairston v. Danville & W. R. Co., 52 L. Ed. 637; Chicago St. P. M. & O. R. Co. v. Holmbert, 282 U. S. 162, 75 L. Ed. 27; Nashville C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. Ed. 949; Penn. Coal Co. v. Mahon, 260 U. S. 393, 67 L. Ed. 322; Thompson v. Cons. Gas Util. Corp., 300 U. S. 55, 81 L. Ed. 510; Treigle v. Acme Homestead Assn., 297 U. S. 189, 80 L. Ed. 575; and other cases cited in Cities' briefs heretofore filed in this case.

"(9) That the Court has overlooked in deciding this case that the public interest and convenience does not justify taking one person's property and giving it to another without payment of compensation therefor or without due reciprocity of advantage; Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U. S. 613, 79 L. Ed. 1090.

* * * * * * *

"(12) That this Court has overlooked in deciding this case that an order of Commission cannot legally and constitutionally be applied retroactively or retrospectively so as to destroy or impair existing vested rights or defenses; that when Commission entertained the application of Peerless to settle a dispute between Peerless and Cities, as provided by 52 O. S. 1941, Sec. 233, and held a hearing thereon under said statute and existing facts, including current regulations covering tender of gas, it was conducting a judicial inquiry (Prentis v. Atlantic Coastline Co., supra; In Re County Commissioners, supra) and could not lawfully, after institution of the proceedings and the hearing thereon, promulgate a legislative order having the force of law and apply it retroactively or retrospectively in settling a dispute arising under a statute already in existence

and based upon past facts; Miller v. U. S., 294 U. S. 436, 79 L. Ed. 997, where it is said, on page 981:

" 'An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only.'

"In this connection it should be specifically noted that according to the application of Peerless itself the only issue in dispute between Cities and Peerless was price, and Peerless has also so conceded in its brief.

"(13) That the Statutes of Oklahoma mentioned, referred to and set forth in said decree, judgment, decision and opinion of this Court, as interpreted and applied therein by the Court, as well as orders of Commission, under the undisputed and indisputable evidence and facts in the record, are repugnant to, violate and contravene the due process and equal protection clauses of and the 14th Amendment to the Constitution of the United States, the commerce clause, Sec. 8, Art. 1, United States Constitution, and the contract clause, Sec. 10, Art. 1, United States Constitution."

In determining the Federal issues adversely to Appellant's contention the Oklahoma Supreme Court held:

"4. The due process and equal protection provisions of the Federal and State Constitutions do not preclude the state, in the exercise of its power to preserve the correlative rights of producers of natural gas from a common reservoir, from requiring one either to shut down its wells or take ratably from the other producer who has no outlet and pay the established field price for the gas so taken, such being but a practical or feasible alternative consistent with production by both to protect the one from drainage by the other.

"5. The Commerce clause of the Federal Constitution does not preclude the state in the protection of local interests from fixing a uniform minimum price

consideration as a condition of the taking of natural gas from a common reservoir because a producer therefrom will in the normal course of business sell and deliver gas in interstate commerce. The regulation is imposed before the operation of interstate commerce occurs."

In the body of the Oklahoma Supreme Court's opinion the Federal issues are met in this manner:

"We think it clear that the due process and equal protection provisions of the Federal and State Constitutions do not preclude the State, in the exercise of its power to preserve the correlative rights of producers of natural gas from a common pool, from requiring one either to shut down its wells or take ratably from the other producer who has no outlet under such terms as the parties may agree upon; or in default of agreement, to take upon such terms and price as may be fixed by the Corporation Commission consistent with equality in returns for gas taken in the field. Such device is but a practical or feasible alternative consistent with production by both to protect the one from drainage by the other.

"The Commission's order, made under the provisions of section 233, supra, directing that Cities Service as a condition of its further taking of gas from the field, should take ratably from the wells of Peerless, is readily sustainable. The portion of the order directing payment for the gas so taken at not less than 7¢ per thousand cubic feet at the wellhead rests upon the Commission's general order prohibiting the taking of gas from the producing structures or formations in the field for a price at the wellhead of less than 7¢ per thousand cubic feet.

"Such policy of the law-making body of the state is expressed in the 1915 Act. In the nature of the subject matter the Legislature was compelled to leave to another agency of the state the duty of bringing about the result pointed out by the statute. As has been noted, under Section 239, supra, the Commission is charged with the duty of regulating the taking of

gas from a common source of supply. The standard to guide the Commission in acting thereunder is the prevention of waste, the protection of the interest of the public, and the protection of the interest of all those having a right to produce from such common source of supply. There is no invalid delegation of power by reason of uncertainty in the stated criterion and the act does not confer arbitrary and uncontrolled powers. The price-fixing feature of the Commission's order is but a means of securing the purpose for which the act was passed, or is the instrumentality employed by the Commission to carry out the legislative will and it is limited in its use to the effecting of the expressed purpose. The validity of the order rests in its reasonableness and relevancy to the policy the Legislature was free to adopt.

"The testimony abundantly supports a conclusion that the conditions under which gas is being taken from the field is injurious to the interest of the public at large, and inimical to the interest of a substantial group such as landowners and others and is resulting in economic waste and conducive to physical waste. The testimony demonstrates that the price fixed as a condition of the further taking of gas from the field is reasonable and not beyond the requirements of the situation sought to be corrected, and will not result in discrimination.

"Cities Service contends the order appealed from impedes and impairs interstate commerce in violation of the commerce clause of the Federal Constitution. In Interstate Natural Gas Co. v. Federal Power Commission, 67 S. Ct. 1482, 331 U.S. 682, 91 L. Ed. 1742, in a case involving the jurisdiction of the Federal Power Commission, we note this expression:

" 'In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regula-

tion in areas in which the states are constitutionally competent to act. . . .' "

"Here the Corporation Commission has fixed a minimum price for gas in a natural common reservoir; such price to be applied at the wellhead as a condition of the taking. The regulation applies to the production of natural gas and though it results in an incidental effect upon the sale price for gas after the gas has been reduced to possession, the subsequent sale of gas for delivery into another state does not brand the Commission order as a regulation of interstate commerce. The regulation is imposed before any operations of interstate commerce occur. In Parker, Director of Agriculture, et al. v. Brown, 317 U. S. 341, it is said:

" '. . . No case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.'

"We do not perceive that the commerce clause of the Federal Constitution precludes the state in the protection of local interests from fixing a uniform minimum price consideration as a condition of the taking of natural gas from a common reservoir because a producer therefrom may have contracted or will contract for sale and delivery of his share of the production outside the state, or because a purchaser from such producer will sell and transport the gas in interstate commerce.

"The general order of the Commission fixing the minimum price for gas taken from the field as a part of the order requiring Cities Service to take ratably from the Peerless wells and as applied to Cities Service has the effect of requiring Cities Service to take ratably from Peerless and pay for the gas so taken at a price equal to the minimum price it must obtain for

gas from its own wells offered at the well. If it may be said that under the price-fixing order, Cities Service with ownership of pipeline facilities, might take gas from its own wells and after payment of public charges and royalty claims on the gas on a basis of the minimum price fixed by the state, run the gas across the state line and there with profit make disposition of the gas at prices below the minimum price fixed by the state, it does not follow that it has a right to use its pipeline facilities to gather gas from other wells on such basis, in otherwise disregard of price regulations, or that it may so use its wells as to effect a drainage from others without liability having relation to the price regulation.

"We find no basis in the due process and equal protection clauses of the Federal and State Constitutions for condemning the orders in their application to Cities Service.

"Cities Service complains ~~of certain rulings~~ in reference to certain pleadings filed and complains of the Commission's conduct and rulings in the course of the various hearings held leading up to the promulgation of the orders here under attack.

"The orders are legislative in character and subject in a large measure to the rules and principles by which the validity of statutes are determined. In the hearings preceding the orders, and not for violation thereof, the rules and principles of procedure obtaining in the enactment of a statute more nearly apply than the strict rules applicable to law courts.

"We have examined the record and find substantial evidence to support the Commission's findings and no error of law is committed."

VIII

Grounds upon Which It Is Contended the Federal Questions Involvd Are Substantial

A mere summarization of the holding of the Supreme Court of Oklahoma should suffice to demonstrate that the

Federal issues presented by the assignment of errors in this appeal are substantial.

The Assignment of Errors in itself constitutes a statement clearly showing the grounds upon which Appellant contends the Federal questions involved are substantial, and for the convenience of the Court the Assignment of Errors are here set out at length, namely:

"ASSIGNMENT OF ERRORS

"I

"The Supreme Court of the State of Oklahoma erred in deciding that Order 19,514 and the statute 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section I of the 14th Amendment to the United States Constitution, because:

"(a) Said order 19514 as written, carrying severe penalties for violation thereof, is so vague, indefinite and uncertain, so intermingles findings of fact and law and is subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer cannot in advance of production or purchase with clarity and particularity determine his rights, duties and obligations thereunder and producers and purchasers must necessarily guess at the meaning thereof and differ as to its application and effect.

"(b) Said order 19514 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record in that the record shows no waste of gas as defined or contemplated by the Oklahoma statutes was being committed or imminent in said gas field; that correlative rights

of producers, landowners and royalty owners in or to gas, as such, were and are being protected and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma statutes and subsisting orders of said Commission, and by reason thereof said order and the findings in support thereof are arbitrary, discriminatory, and demonstrably irrelevant to any pertinent policy the Oklahoma Legislature is free to adopt. In connection therewith said Court should have ordered sustained Appellant's combined demurrer, motion to dismiss, and motion for judgment, on the grounds therein stated.

"(c) The record discloses no facts which present a sound or substantial basis for limiting the application of said order 19514 increasing the price of gas twofold to one gas field to the exclusion of other Oklahoma gas fields, thereby resulting in discrimination and denial of the equal protection of the law.

"(d) Said Order 19514 and said statute 52 O. S. 1941, 239, as applied by said Court take Appellant's property without compensation and give it to another without any justifying public purpose or due reciprocity of advantage therefor.

"(e) Said statute 52 O. S. 1941, 239, is not ambiguous and no justifiable reason exists authorizing said Court by implication of law or judicial fiat to arbitrarily interpolate into said statute gas price-fixing powers not placed therein by the State Legislature.

"(f) Said statute 52 O. S. 1941, 239, sets forth no standard or policy to guide said Commission in exercising any claimed price-fixing powers thereunder and, in the absence thereof, reposes in said Commission an absolute unregulated, unbridled, undefined and arbitrary discretion with respect thereto.

"II

"The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S.

1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section 1 of the 14th Amendment to the United States Constitution, because:

"(a) Said order 19515 as written, carrying severe penalties for violation thereof, is so vague, indefinite and uncertain, so intermingles findings of fact and law and is subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer cannot in advance of production or purchase with clarity and particularity determine his rights, duties and obligations thereunder and purchasers and producers must necessarily guess at the meaning thereof and differ as to its application and effect.

"(b) Said order 19515 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record and in connection therewith the Court should have ordered sustained Appellant's demurrer, motion to dismiss, and motion for judgment; its motion to set aside findings of fact and conclusions of law entered by Commission and substitute therefor certain findings of fact and conclusions of law submitted by Appellant and for judgment; and its motion for new trial, all upon the grounds set forth in said instruments.

"(c) Said Commission unlawfully applied retroactively the price and measurement base fixed by its legislative order 19514 to Appellant by Order 19515 in settling said claimed judicial dispute which arose, if at all, between the parties on past facts and under a particular state statute, 52 O. S. 1941, 233, already in existence, thereby depriving Appellant of vested rights and defenses in the settlement of said purported dispute.

"(d) Said order 19515 and said statute 52 O. S. 1941, 233, as applied to Appellant by said Court require Appellant to discriminate as to price and measurement base in favor of Appellee Peerless Oil and Gas Company and against other sellers of gas in said field in that said order is a special judicial directive, leveled solely against Appellant, requiring it to pay said Appellee a price per MCF of natural gas higher than the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the field, which said contracts are specifically authorized by 52 O. S. 1941, 233, and in addition thereto, by reason thereof, takes Appellant's property without compensation and gives it to said Appellee without any justifying public purpose or due reciprocity of advantage therefor.

"(e) Said statute 52 O. S. 1941, 233, sets forth no standard or policy to guide said Commission in acting thereunder and in effect reposes in said body an absolute unregulated, unbridled, undefined and arbitrary discretion in fixing the price and other terms for purchasing natural gas.

"III

"The Supreme Court of the State of Oklahoma erred in holding and deciding said Commission granted Appellant a fair and impartial trial and hearing in accordance with the procedural due process of the 14th Amendment, Section 1, Article XIV, U. S. Constitution:

"(a) By refusing to inform Appellant in advance of the trial of the case what rules of practice and procedure would be applied by Commission at the hearing thereof;

"(b) By allowing the misjoinder of judicial and legislative matters;

"(c) By erroneously consolidating judicial and legislative matters;

"(d) By erroneously allowing Commissioners of the Land Office to file petition in intervention and intervene in the case;

"(e) By allowing a private citizen to make a statement and speech to the Commission during the course of the trial;

"(f) By conducting a plebiscite of land and royalty owners while case was in hearing;

"(g) By filing petitions with Federal Power Commission while trial was in progress stating Commission was interested in increasing price of natural gas;

"(h) By Allowing Commission's conservation attorney to participate and take an active part in trial of private dispute between Appellee Peerless and Appellant;

"(i) By admitting incompetent and hearsay evidence and testimony and by making findings contrary to the undisputed and indisputable character of the evidence;

"(j) By refusing to segregate and separate the evidence of Appellee Peerless, Land Office and others at the close of their testimony so Appellant could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case;

"(k) By Commission's refusing to recognize, apply, and abide by its own subsisting orders.

"IV

"The Supreme Court of the State of Oklahoma erred in deciding that Order No. 19514 and the statute 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article 1,

United States Constitution, because said order 19514 increases the going and market price of gas twofold in said field and is limited solely to one gas field to the exclusion of other gas fields in the State of Oklahoma, and 90% of all gas produced in said field and practically all of Appellant's gas is immediately, without interruption, transported and sold in interstate commerce and by reason thereof said order 19514 and said statute 52 O. S. 1941, 239, as applied, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant.

"V

"The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S. 1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article I, United States Constitution, because said gas being taken and purchased by Appellant from said Appellee Peerless Oil and Gas Company under subsisting stipulation in effect at the time of the making of said order 19515 is immediately, without interruption, transported in interstate commerce for resale and said order, being directed solely against Appellant and increasing twofold the price of gas in said field, casts an undue burden upon and discriminates against the interstate operations and business of Appellant."

In order, however, to eliminate any question as to the substantiality of the Federal issues presented, Appellant presents the following decisions of the Supreme Court of the United States which Appellant believes unquestionably sustain its assignment of errors and furnish adequate grounds for a review of the judgment, decree and decision of the Supreme Court of Oklahoma as applied to the operations

and business of Appellant under the undisputed and indisputable evidence in the record, namely:

Connally v. *General Construction Company*, 269 U. S. 385, 70 L. Ed. 322; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 79 L. Ed. 949; *Reagin* v. *Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. Ed. 1014; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322; *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 52 L. Ed. 637; *Chicago St. P. M. & O. R. Co.* v. *Holmbert*, 282 U. S. 162, 75 L. Ed. 270; *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, 79 L. Ed. 1090; *Treigle* v. *Acme Homestead Association*, 297 U. S. 180, 80 L. Ed. 575; *Thompson* v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55, 81 L. Ed. 510; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 68 L. Ed. 813; *Southern Railway Co.* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 260; *Kessler* v. *Strecker*, 307 U. S. 22, 83 L. Ed. 1082; *Morgan* v. *U. S.*, 304 U. S. 1, 82 L. Ed. 1129; *U. S.* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446; *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Lempke* v. *Farmers Grain Co.*, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 457; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 45 S. Ct. 481, 60 L. Ed. 909; *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032; *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 657, 93 L. Ed. 682; *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 683, 91 L. Ed.

1743; *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570; *Prentis* v. *Atlantic Coastline Company*, 211 U. S. 210, 53 L. Ed. 150, and Interstate Compact to Conserve Oil and Gas executed by Oklahoma and other states and consented to by Congress by Joint Resolution of August 27, 1935, c. 981, 49 Stat. 939-941.

IX

Cases Sustaining Jurisdiction of United States Supreme Court

(a) The appeal having been perfected within ninety days from date on which the judgment of the Oklahoma Supreme Court became final is timely (Sec. 2101, Tit. 28, U. S. Code Revised).

(b) Appeal is the proper remedy for review of a decision of a state court of last resort in favor of the validity of state statutes and of administrative orders issued pursuant to legislative authority claimed to be delegated by such statutes where the statutes and the orders thereunder issued are alleged to contravene the Federal Constitution (Sec. 1257, Tit. 28, U. S. Code Revised).

Hamilton v. *Regents of the University of California*, 293 U. S. 245, 79 L. Ed. 343; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857; *Market Street Railroad Co.* v. *Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836; *Postal Teleg. Cable Company* v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215; *Sterling* v. *Constantin*, 287 U. S. 387, 77 L. Ed. 375; *Pollock* v. *Williams*, 322 U. S. 4, 88 L. Ed. 1095; *Williams* v. *North Carolina*, 325 U. S.

226, 89 L. Ed. 1577; *Hoover & A. Company, v. Evatt*, 324 U. S. 652, 89 L. Ed. 1252; *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 82 L. Ed. 702; *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 86 L. Ed. 1090; *Broad River Power Company v. South Carolina*, 281 U. S. 537, 74 L. Ed. 1023; *Greenough v. Tax Assessor*, 331 U. S. 486, 91 L. Ed. 1621, 1630.

X

Copies of All Opinions Delivered in Connection With the Judgment Sought to Be Reviewed

Appellant appends to this Jurisdictional Statement Copies of Orders 19514 and 19515 in Cause C. D. 1054 before the Corporation Commission of Oklahoma (Appendix "A & B")* and copy of pertinent Oklahoma laws involved (Appendix "C") as well as copy of the Judgment, Decree and Decision of the Supreme Court of Oklahoma consisting of the majority opinion of the Court filed January 17, 1950, and dissenting opinions filed by Halley, J; and Gibson, J. (Appendix "D").* The Order Sheet of the Supreme Court dated March 21, 1950 contains the following statement:

> "The Clerk is hereby directed to enter the following Orders:
>
> "32,994—Cities Service Gas Company, a Corporation v. Peerless Oil & Gas Company, a Corporation, et al.
>
> "33,006—Phillips Petroleum Company, a corporation v. State of Oklahoma, et al.
>
> "Petitions for Rehearing and Oral Argument in the above consolidated causes denied."

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* (Clerk's Note.—The Orders and Opinions appear as appendices to the Statement as to Jurisdiction in *Phillips Petroleum Co. v. Oklahoma*, No. 73, October Term, 1950 and are not reprinted here.)

Wherefore, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257, Title 28, United States Code Revised.

Dated this 19 day of May, 1950.

Glenn W. Clark,
R. E. Cullison,
Joe Rolston, Jr.,
Robert R. McCracken,
First National Building,
Oklahoma City, Oklahoma,
Attorneys for Appellant,
Cities Service Gas Company.

APPENDIX C

Chapter 198, Laws of Oklahoma 1913, which comprises 52 O. S. 1941, Sections 231 to 235 inclusive, reads:

"§ 231. Ownership of gas.—All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees, of the surface under which gas is located in its original state. Laws 1913, ch. 198, p. 439, § 1.

"§ 232. Drilling rights.—Restrictions on output.—Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. If such other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well. Laws 1913, ch. 198, p. 440, § 2.

"§ 233. Sale of gas.—Prices and amounts of gas to be taken—Delivery.—Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and

upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. Laws 1913, ch. 198, p. 440, § 3.

"§ 234. Misappropriation of gas.—Liability for damages and penalties.—Any person, firm or corporation, taking more than his or its proportionate share of such gas, in violation of the provisions of this act, shall be liable to any adjoining well owner for all damage sustained thereby and subject to a penalty for each violation not to exceed five hundred dollars ($500.00), each day such violation is continued shall be a separate offense. Laws 1913, ch. 198, p. 441, § 4.

"§ 235. Misappropriation of gas.—Criminal responsibility.—Any person or agent of a corporation, who takes gas, or aids or abets in the taking of gas, except as herein provided, either directly or indirectly, as an individual, officer, agent, or employee of any corporation, shall be guilty of grand larceny, and, upon conviction thereof, shall be sentenced to the penitentiary not to exceed five (5) years. Laws 1913, ch. 198, p. 441, § 5."

Chapter 197, Laws of Oklahoma 1915, which comprises 52 O.S. 1941, Sections 236 to 247, inclusive, reads:

"§ 236. Waste prohibited.—The production of natural gas in the State of Oklahoma, in such manner, and under such conditions as to constitute waste, shall be unlawful. Laws 1915, ch. 197, § 1.

"§ 237. Waste defined.—The term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas. Laws 1915, ch. 197, § 2.

"§ 238. Conservation of gas—Whenever natural gas in commercial quantities, or a gas bearing stratum,

known to contain natural gas in such quantity, is encountered in any well drilled for oil or gas in this state, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters. Any unrestricted flow of natural gas in excess of two million cubic feet per twenty-four hours shall be considered a commercial quantity thereof; provided, that if in the opinion of the Corporation Commission, gas of a lesser quantity shall be of commercial value, said Commission shall have authority to require the conservation of said gas in accordance with the provisions of this act; and provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for the period of three days. Laws 1915, ch. 197, §3.

"§ 239. Common source of supply.—Excess gas supply—Apportionment and regulation to prevent waste.—Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to

prevent waste protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, § 4.

"§ 240. 'Common purchaser'—Discrimination in purchases prohibited—Regulation of purchases.—Every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing; But if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade. Laws 1915, ch. 197, § 5.

"§ 241. Enforcement of Act—Hearings before Corporation Commission.—Any person, firm or corporation, or the Attorney General, on behalf of the state

may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this act; and jurisdiction is hereby conferred upon said commission to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such mesne and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law. Laws 1915, ch. 197, § 6.

"§ 242. Appeals to Supreme Court.—Appellate jurisdiction is hereby conferred upon the Supreme Court of this state to review the orders of said commission made under this act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from, may be superseded by the commission or by the Supreme Court upon such terms and conditions as may be just and equitable. Laws 1915, ch. 197, § 7.

"§ 243. Corporation Commission—Authority to make rules and regulations.—The Corporation Commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents, with the consent of

the Governor, as may be necessary to enforce this act. Laws 1915, ch. 197, § 8.

"§ 244. Pipe line companies—Acceptance of act as prerequisite to right to operate.—Before any person, firm or corporation shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain, construct or operate pipe lines, fixtures, or equipments belonging thereto or used in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business of purchasing, piping, or transporting natural gas, as a public service, or otherwise, such person, firm or corporation, shall file in the office of the Corporation Commission a proper and explicit authorized acceptance of the provisions of this act. Laws 1915, ch. 197, § 9.

"§ 245. Mine Inspector—Duties unchanged.—Nothing contained in this act shall be construed to interfere with any duties now imposed by law upon the Chief Mine Inspector of the state or his deputies. Laws 1915, ch. 197, § 10.

"§ 246. Partial invalidity—Effect.—The invalidity of any section, subdivision, clause, or sentence of this act shall not in any manner affect the validity of the remaining portion thereof. Laws 1915, ch. 197, § 11.

"§ 247. Violation—Penalties.—In addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment. Laws 1915, ch. 197, § 12.

No. 153

Supreme Court of the United States

OCTOBER TERM, 1950

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,

VERSUS

PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE APPELLANT

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October, 1950.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Oklahoma and dissenting opinions (R. 895-927) are reported in 220 Pac. (2d) 279.

JURISDICTION

The judgment, decree and decision of the Supreme Court of Oklahoma was entered on January 17, 1950 (R. 897). Petition for rehearing was duly filed and was denied, without opinion, by the Supreme Court of Okla-

homa on March 21, 1950 (R. 931, 944). On May 19, 1950, within ninety days from the date said judgment, decree and decision became final, Appellant's petition for appeal was presented to and allowed by the Chief Justice of the Oklahoma Supreme Court (R. 954, 962). The jurisdiction of this Court rests on 62 Stat. 929, 28 U. S. C. A. 1257(2). See, also, Jurisdictional Statement of Appellant.

QUESTIONS PRESENTED

Appellant has taken the liberty of rephrasing and rearranging its several specifications of error in the form of questions presented so as to merge several assignments into a single question and enable this Court to more clearly and accurately understand and consider the position and respective points of contention of Appellant, namely:

1. Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, 239, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the state legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

2. If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 239, for the purpose of conservation and in the public interest, to fix a minimum price for natural gas produced in Oklahoma, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a producer and purchaser

of natural gas prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19514, make the findings it did in support thereof, and limit the effect and operation of said order to the Guymon-Hugoton Field to the exclusion of other Oklahoma gas fields?

3. Is Order 19514 of the Oklahoma Corporation Commission as written, carrying severe penalties for violation thereof, so vague, indefinite and uncertain, the findings of fact and law so intermingled, and the order subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer can not in advance of production or purchase, with clarity and particularity, determine his rights, duties and obligations thereunder as due process requires?

4. Does 52 O. S. 1941, 233, contain a sufficient standard within the meaning of the provisions of the 14th Amendment to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current, or going price and other terms for the taking and purchasing of natural gas different from those prevailing in the field at the time and place of the tender, taking or purchase where the parties thereto cannot agree upon the terms thereof?

5. If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 233, for the purpose of settling a dispute between a producer and a taker or purchaser of gas, to fix the price or terms thereof, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a purchaser and taker of natural gas in Oklahoma prove facts legally suf-

ficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19515, make the findings it did in support thereof, and apply retroactively to Appellant by said order, in settling said dispute, the price and measurement base fixed by its legislative Order 19514, when such applied price was twofold the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the Guymon-Hugoton Field made as authorized by 52 O. S. 1941, 233?

6. Was Appellant granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before the Oklahoma Corporation Commission leading to the issuance of Order 19515?

7. Do Orders 19514 and 19515 and the respective statutes 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, as interpreted and applied to the operations of Appellant under the undisputed and indisputable evidence in the record, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant?

ORDERS AND STATUTES INVOLVED

Orders 19514 (R. 11, 18) and 19515 (R. 19, 28, 29), omitting caption and findings, and the respective state statutes 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, the constitutionality of

which orders and statutes as applied to the operations of Appellant is being questioned in this appeal, read:

Order 19514

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"2. This order shall be effective as of January 1st, 1947."

52 O. S. 1941, 239

"Sec. 239. Common source of supply—Excess gas supply—Apportionment and regulation to prevent waste. Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or

equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. Laws 1915, ch. 197, sec. 4."

Order 19515

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas ratably from applicant's well located in Section 8, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"2. That the respondent, Cities Service Gas Company, be and it is hereby required to take natural gas ratably from applicant's well located in Section 5, Township 4 North, Range 16 E. C. M., Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"3. That respondent shall pay to applicant for the natural gas so taken not less than 7¢ per thousand cubic feet of natural gas at the wellhead, measured at a pressure of 14.65 pounds absolute pressure per square inch.

"4. That no natural gas shall be taken out of the producing structures or formations in the Guymon-

Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"5. This order shall be effective as of January 1st, 1947."

52 O. S. 1941, 233

"Sec. 233. Sale of gas—Prices and amounts of gas to be taken—Delivery. Any person, firm or corporation, taking gas from a gas field, except for purpose of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. Laws 1913, ch. 198, p. 440, Sec. 3."

For the convenience of the Court all of the pertinent Oklahoma Statutes involved in this appeal are set forth verbatim in Appendices E and F.

STATEMENT

The Hugoton Gas Field is located in the states of Oklahoma, Kansas and Texas and is one of the largest known gas reserves in the United States (R. 536, 537). There are numerous gas wells in this field in each state

(R. 88). This appeal concerns that portion of the Hugoton Gas Field lying within Texas County, Oklahoma, which has been named the "Guymon-Hugoton pool" (R. 537).

The business of Appellant, Cities Service Gas Company, hereinafter called "Cities Service" or "Appellant", is the acquiring of gas reserves by leases, the acquiring of other reserves by means of gas purchase contracts, the production and purchase of gas, and the transportation of it to markets located in Kansas, Missouri, Nebraska, and some in Oklahoma, in which states, with Texas, its operations are confined (R. 390). Cities Service is a producer and purchaser of natural gas in the Guymon-Hugoton pool in Texas County, Oklahoma. Appellant directs the immediate attention of the Court to Exhibit 68 (R. 636A) which is a map in color showing the complete integrated pipe line system of Cities Service during all times material herein, setting forth in yellow the fields in which Cities Service produces gas; in tan the fields in which it purchases gas; in green the fields in which it both purchases and produces gas; and in blue its storage fields.

The companies in addition to Cities Service that take gas out of the Guymon-Hugoton gas pool in Texas County, Oklahoma are: Southwest Public Service Company, Phillips Petroleum Company, and Panhandle Eastern Pipe Line Company (R. 386). Cities Service's purchases of gas in the Guymon-Hugoton pool are by means of pipe line deliveries (R. 390). The producers own their own leases, wells and gathering lines, and bring the gas to the points of delivery on Cities Service's gathering system (R. 390). The sales are made by means of written contracts (R. 390)

and the price ($4\frac{1}{2}$¢ per mcf) and the measurement base (16.4 lbs. absolute per square inch) in each contract are the same (R. 393), the $\frac{1}{2}$¢ being for gathering, transportation and delivery (R. 396). The purchases of gas are made for the purpose of supplying Appellant's markets and performing written contract commitments therefor (R. 390). Cities Service takes title to the gas purchased in the pool at the point of delivery as it flows uninterruptedly to its markets in four states (R. 401).

There are approximately 1,062,000 acres of gas proven acreage in the Guymon-Hugoton gas pool and of this Cities Service owns and produces from about three-tenths (.3) of this acreage (R. 417-418). A very small part of the gas produced in the pool is sold in Oklahoma. About 90% of all gas produced and transported out of said pool by the various companies goes into interstate commerce (R. 386-387). Practically all the gas Cities Service produces and purchases goes into interstate commerce (R. 389-390).

On December 9, 1946, Appellee, the Corporation Commission of the State of Oklahoma, hereinafter called "Commission", after a hearing, issued simultaneously two gas price-fixing orders numbered respectively 19514 and 19515, both made effective January 1, 1947 (R. 11-18, 19-29). Order 19514, legislative in character, is limited in effect and operation solely to the Guymon-Hugoton gas pool in Texas County, Oklahoma, and in substance commands that no natural gas shall be taken out of the producing structures or formations in said field at a price at the wellhead of less than seven cents (7¢) per mcf measured at a

pressure of 14.65 pounds absolute pressure per square inch* (R. 11-18). Order 19515, judicial in character, is directed solely against Appellant Cities Service as a purchaser of gas in the pool and in substance commands Cities Service to take by purchase, natural gas from two designated wells of Appellee Peerless in said pool and to pay Peerless therefor not less than the seven-cent (7¢) price on the measurement base prescribed by Commission's Order 19514 (R. 19-29).

The Supreme Court of Oklahoma has decided that Commission Order 19514 is based upon and authorized by 52 O. S. 1941, 239, for the sole purpose of preventing waste, protecting correlative rights and the interest of the public (R. 910-911), and Order 19515 is based upon and authorized by 52 O. S. 1941, 233 (R. 905).

The proceeding before said Commission that gave rise to the issuance of each of said price-fixing orders was originated by the filing with Commission of a twofold application by Peerless, a producer of gas in said pool, against Cities Service, a producer and also a purchaser of natural gas therein, owning and operating an interstate gas pipe line system extending therefrom, requesting Commission (a) to order Cities Service to make a connection with and purchase natural gas from a certain well of Peerless in said pool at a price and upon terms to be fixed by said Commission, and (b) to fix the price to be paid by all purchasers of natural gas in said pool (R. 31-38). Said appli-

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*The price of 7c per mcf on the pressure base prescribed by the Commission amounts to approximately 7.77c per mcf on the pressure base used by Appellant and others in the Guymon-Hugoton Field.

cation also alleged a written tender of gas from the Peerless well to Cities Service prior to the filing of the Peerless application at a price of 6¢ per mcf (R. 33, 35, 37). The application also alleged that:

> "* * * ten cents (10¢) for one thousand (1000) cubic feet of natural gas, measured at atmospheric pressure, is a reasonable price for natural gas in the Hugoton, Oklahoma gas field, and that by fixing the price to be paid by all purchasers of natural gas in the Hugoton, Oklahoma gas field at ten cents (10¢) per one thousand (1000) cubic feet of natural gas, measured at atmospheric pressure, the Corporation Commission of the State of Oklahoma will prevent waste of natural gas, conserve natural gas, and prevent use of natural gas for inferior purposes" (R. 34).

The Peerless application further stated that Cities Service had signified its willingness to take the natural gas produced from the Peerless well ratably with natural gas taken from wells owned and operated by Cities Service and others in the pool, but a dispute had arisen between Peerless and Cities Service as to the price to be paid for the natural gas to be produced from the Peerless well (R. 33).

At the time of the tender of gas by Peerless from its well to Cities Service and as of the dates of other tenders of gas involved in this case, and at the time of the hearing and issuance of said orders of Commission being questioned in this appeal, there existed in said pool subsisting Order 17867 of Commission governing the production and marketing of gas in said pool, which order still subsists, Exhibit 9 (R. 535-549). Paragraph 4(b) of said Order 17867 (R. 543), as construed and interpreted by the Supreme Court

of Oklahoma (Application of Moran, 201 Okla. 43, 200 Pac. [2d] 758), required that a producer, in order to have its acreage considered or held to be producing acreage, was required to show by its tenders that it was in good faith willing to sell the gas from its wells at the going price in the field, and that going price was substantially the same as market price or current price, *id.* (R. 540, 543). Said order in paragraph 9 thereof (R. 548) also required all purchasers, takers and producers of gas in the pool to comply with the common purchaser and ratable taking provisions of the Oklahoma Statutes by the equitable purchasing, producing and taking of all the gas without discrimination in favor of one producer as against another. There was also in full force and effect at the time of said tenders of gas by Peerless to Cities Service for purchase, Revised Maximum Price Regulation No. 436, Exhibit A (R. 748-790, 447, 448), promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended, 58 Stat. 632, 50 U. S. C. A. 901, *et seq.*, making it unlawful for any person to sell or deliver or pay or receive in the course of trade or business any natural gas at a price higher than the maximum price fixed by said regulation, and providing further that no person "shall agree, offer, or attempt to do any of these things" (R. 749-784). The price under the regulation for dry wellhead gas was 4¢ per mcf, Exhibits 76, 77, 78, 79 (R. 745-747, 447).

Cities Service responded to the Application of Peerless by a written answer filed with Commission, among other things denying the jurisdiction and authority of Commission to grant Peerless the relief requested because, *inter*

alia, the granting of such relief would contravene the due process, equal protection and commerce clauses of the Federal Constitution (R. 46-63). In its answer Cities Service voluntarily offered to take and purchase gas from the Peerless well at the going price for natural gas in said pool in harmony with subsisting orders of Commission and in accordance with existing laws of Oklahoma (R. 48, 49).

A hearing was held before Commission on the issues joined by the Peerless Application and the written answer of Cities Service responding thereto. The undisputed and indisputable evidence there adduced disclosed the following facts:

That at the time Peerless tendered gas from its said wells to Cities Service for purchase, and at the time of the hearing of said cause, the going price, market price or weighted average price for natural gas sold in said pool was not in excess of 4¢ or 5¢ per mcf (R. 183, 393, 394, 745, 415). One sale, J. M. McCormick to Cabot Carbon Company, pipe line delivered, was 5¢ per mcf (R. 395). This latter sale was on special emergency order of Commission, Exhibit 10 (R. 550-554). At the time Peerless tendered gas to Cities Service for purchase at 6¢ it was selling gas in the field to another at 4½¢ per mcf (R. 395). At said time Cities Service was purchasing gas from other producers in the pool at 4½¢ pipe line delivered (R. 390, 393, 396, 688-712, 713-744, 795-802). The philosophy of Peerless in support of its twofold price-fixing application was explained at the hearing by the attorney for Peerless, in this manner:

"If the Commission, please, if we hadn't asked that the price in the field be fixed in this way, then we would have had to tender the gas at what they say was the going price in the field, in which event we could never have gotten a price established in the field". (R. 81).

The undisputed evidence further disclosed that no waste of gas during the times material herein as defined or contemplated by the Oklahoma Statutes was being committed or imminent in said pool (R. 63-321); that correlative rights of producers, landowners and royalty owners in or to gas as such, were and are being protected, and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma Statutes and subsisting orders of said Commission (R. 63-321). The only evidence even remotely pertaining to waste or lack of conservation of gas in said pool was the testimony of gas men, not qualified as economists, to the effect that the intrinsic value of gas, when compared with fuel oil, coal and other fuels, based upon assumed values, respectively, was 10¢ per mcf at the wellhead in said pool (R. 161, 163-164, 118-119, 282-283), and that in order to prevent waste and conserve gas as a natural resource it was their opinion the minimum price of natural gas in said pool should not be less than 10¢ per mcf (R. 280, 283, 163-164, 118-119) and that any price less than 10¢ was waste (R. 297-298, 163-164, 118-119). No evidence was offered at the hearing or appears in the record disclosing any economic distress in the industry or in the pool or the Hugoton Gas Field.

While the hearing was in prograss and prior to the time Peerless rested its case, Peerless and Cities Service

entered into a written stipulation, Exhibit 55 (R. 589-590, 211) for the ratable taking and purchasing of gas by Cities Service from two wells of Peerless in said field, including the well on which its application was based, at a price of 4½¢ per mcf delivered to the pipe line of Cities Service in the pool without prejudice to a final determination of measurement and price by Commission and subject to the provision that Cities Service did not waive any right of objection to the jurisdiction or power of said Commission to make any order concerning the taking of, or the price of, or the basis of measurement of, the natural gas so taken or any gas taken from said pool (R. 589). The taking of the Peerless gas under the stipulation eliminated any question of drainage (R. 90).

After the commencement of the hearing between Peerless and Cities Service and during the course thereof, Commission in executive session at an *ex parte* hearing, by written order, granted the application of the Commissioners of the Land Office of the State of Oklahoma, hereinafter called "Land Office", to intervene in said cause and file petition in intervention therein requesting Commission to fix the price of gas in said field as in the sands and in the common reservoir before being removed (R. 168-176, 574), all of which was done without notice to Cities Service or an opportunity to it to oppose the granting of said application and the filing of said petition in intervention (R. 178-181). Thereafter, Commission by written notice invited all producers and purchasers of gas in the field to appear and participate on a designated date in a hearing upon the petition in intervention filed in said cause by Land Office

and on said date proceeded to a hearing upon said petition in intervention and at the same time and as a part thereof resumed the hearing between Peerless and Cities Service over objection of Cities Service (R. 176, 181, 182). Prior to trial and as a part of its written answer, Cities Service objected to a joint hearing of the judicial and legislative requests of Peerless set forth in its said application, pointing out that the request of Peerless to fix the price and other terms of purchase with respect to the purported dispute between it and Cities Service was judicial in character and required a private adversary hearing and that the request of Peerless to fix the price to be paid by all purchasers of natural gas in said field was legislative in character and required a public hearing (R. 179-180). This objection was overruled and denied (R. 181). Cities Service, upon being advised by the attorney for Commission that the subsisting General Rules of Practice and Procedure promulgated and adopted by Commission were not applicable to a hearing for the determination of the issues of the Peerless application, filed its motion for Commission to inform it, before the hearing commenced, what rules of practice and procedure, if any, it would apply to the hearing of said application (R. 44-45), which motion was denied (R. 64).

During the course of the hearing, over objection of Cities Service, Commission allowed Land Office to actively participate in the trial of the combined judicial and legislative issues, introduce evidence, examine and cross-examine witnesses and make objections and legal argument (R. 182). Commission also, over objection of Cities Service, permitted

certain royalty owners in the field, through their spokesman, to give testimony, present a petition, and make a speech to Commission without designating to what phase of the case it pertained (R. 101-107, 568). A plebiscite was conducted by said Commission and a great number of royalty owners were polled as to the filing of said petition so presented and the desires of each royalty owner to increase the price of natural gas in said field (R. 112-117). The Conservation Attorney of the Commission, over objection of Cities Service, was permitted to participate actively in the hearing of said combined judicial and legislative cause by offering exhibits, advising Commission on the law, and inquiring of and cross-examining witnesses (R. 332-333). While the proceedings before said Commission were still pending and undetermined the Commission, through its Conservation Attorney, filed petitions in causes pending before the Federal Power Commission stating, among other things, that said Commission was materially interested in price paid for natural gas and interested in securing a greater purchase price for natural gas at the wellhead in said field (R. 475-476).

After filing motion for new trial, which was overruled by Commission (R. 499), Cities Service, as provided by statute, appealed directly to the Supreme Court of Oklahoma the questioned orders of Commission on the grounds, among others, that said orders and the statutes upon which said orders were respectively based, as applied to the operations of Cities Service, contravene the due process, equal protection, and commerce clauses of the Federal Constitution (R. 500, 501, 1-7, 895-927, 931-943). The Supreme Court of Oklahoma upheld the validity of the orders of

Commission as issued, adjudging that said orders, and each of them, and the respective statutes upon which same were based, did not violate either the due process, the equal protection or commerce clause of the Federal Constitution (R. 895-927).

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

I.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19514 and the statute, 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section 1 of the 14th Amendment to the United States Constitution, because:

(a) Said Order 19515 as written, carrying severe penalties for violation thereof, is so vague, indefinite and uncertain, so intermingles findings of fact and law and is subject to so many varying and contradictory interpretations that a producer or a purchaser from a producer cannot in advance of production or purchase with clarity and particularity determine his rights, duties and

obligations thereunder and producers and purchasers must necessarily guess at the meaning thereof and differ as to its application and effect.

(b) Said Order 19514 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record in that the record shows no waste of gas as defined or contemplated by the Oklahoma statutes was being committed or imminent in said gas field; that correlative rights of producers, landowners and royalty owners in or to gas, as such, were and are being protected and conservation of natural gas was and is being had in said field in accordance with existing Oklahoma statutes and subsisting orders of said Commission, and by reason thereof said order and the findings in support thereof are arbitrary, discriminatory, and demonstrably irrelevant to any pertinent policy the Oklahoma Legislature is free to adopt. In connection therewith said Court should have ordered sustained Appellant's combined demurrer, motion to dismiss, and motion for judgment, on the grounds therein stated.

(c) The record discloses no facts which present a sound or substantial basis for limiting the application of said Order 19514 increasing the price of gas twofold to one gas field to the exclusion of other Oklahoma gas fields, thereby resulting in discrimination and denial of the equal protection of the law.

(d) Said Order 19514 and said statute 52 O. S. 1941, 239, as applied by said Court take Appellant's property without compensation and give it to another without any justifying public purpose or due reciprocity of advantage therefor.

(e) Said statute 52 O. S. 1941, 239, is not ambiguous and no justifiable reason exists authorizing said Court by implication of law or judicial fiat to arbitrarily interpolate into said statute gas price-fixing powers not placed therein by the State Legislature.

(f) Said statute 52 O. S. 1941, 239, sets forth no standard or policy to guide said Commission in exercising any claimed price-fixing powers thereunder and, in the absence thereof, reposes in said Commission an absolute unregulated, unbridled, undefined and arbitrary discretion with respect thereto.

II.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S. 1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not deprive Appellant of its property without due process of law or deny to it the equal protection of the laws in contravention to the provisions of Section 1 of the 14th Amendment to the United States Constitution, because:

(a) Omitted and not to be presented.

(b) Said Order 19515 and the findings in support thereof are contrary to the undisputed and indisputable evidence in the record and in connection therewith the Court should have ordered sustained Appellant's demurrer, motion to dismiss, and motion for judgment;

its motion to set aside findings of fact and conclusions of law entered by Commission and substitute therefor certain findings of fact and conclusions of law submitted by Appellant and for judgment; and its motion for new trial, all upon the grounds set forth in said instruments.

(c) Said Commission unlawfully applied retroactively the price and measurement base fixed by its legislative Order 19514 to Appellant by Order 19515 in settling said claimed judicial dispute which arose, if at all, between the parties on past facts and under a particular state statute, 52 O. S. 1941, 233, already in existence, thereby depriving Appellant of vested rights and defenses in the settlement of said purported dispute.

(d) Said Order 19515 and said statute 52 O. S. 1941, 233, as applied to Appellant by said Court require Appellant to discriminate as to price and measurement base in favor of Appellee Peerless Oil and Gas Company and against other sellers of gas in said field in that said order is a special judicial directive leveled solely against Appellant, requiring it to pay said Appellee a price per mcf of natural gas higher than the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the field, which said contracts are specifically authorized by 52 O. S. 1941, 233, and, in addition thereto, by reason thereof, takes Appellant's property without compensation and gives it to said Appellee without any justifying public purpose or due reciprocity of advantage therefor.

(e) Said statute 52 O. S. 1941, 233, sets forth no standard or policy to guide said Commission in acting

thereunder and in effect reposes in said body an absolute unregulated, unbridled, undefined and arbitrary discretion in fixing the price and other terms for purchasing natural gas.

III.

The Supreme Court of the State of Oklahoma erred in holding and deciding said Commission granted Appellant a fair and impartial trial and hearing in accordance with the procedural due process clause of the 14th Amendment, Section 1, Article XIV, United States Constitution:

(a) By refusing to inform Appellant in advance of the trial of the case what rules of practice and procedure would be applied by Commission at the hearing thereof;

(b) By allowing the misjoinder of judicial and legislative matters;

(c) By erroneously consolidating judicial and legislative matters;

(d) By erroneously allowing Commissioners of the Land Office to file petition in intervention and intervene in the case;

(e) By allowing a private citizen to make a statement and speech to the Commission during the course of the trial;

(f) By conducting a plebiscite of land and royalty owners while case was in hearing;

(g) By filing petitions with Federal Power Commission while trial was in progress stating Commission was interested in increasing price of natural gas;

(h) By allowing Commission's conservation attorney to participate and take an active part in trial of private dispute between Appellee Peerless and Appellant;

(i) By admitting incompetent and hearsay evidence and testimony and by making findings contrary to the undisputed and indisputable character of the evidence;

(j) By refusing to segregate and separate the evidence of Appellee Peerless, Land Office and others at the close of their testimony so Appellant could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case;

(k) By Commission's refusing to recognize, apply, and abide by its own subsisting orders.

IV.

The Supreme Court of the State of Oklahoma erred in deciding that Order No. 19514 and the statute 52 O. S. 1941, 239, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article I, United States Constitution, because said Order 19514 increases the going and market price of gas twofold in said field and is limited solely to one gas field to the exclusion of other gas fields in the State of Oklahoma, and 90% of all gas produced in said field and practically all of Appellant's gas is immediately, without interruption, transported and sold in interstate commerce and by reason thereof said Order 19514

and said statute 52 O. S. 1941, 239, as applied, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant.

V.

The Supreme Court of the State of Oklahoma erred in deciding that Order 19515 and the statute 52 O. S. 1941, 233, upon which said Court determined said order was authorized, as construed and applied to Appellant by the decision of said Court under the undisputed and indisputable evidence in the record, did not violate the commerce clause, Section 10, Article I, United States Constitution, because said gas being taken and purchased by Appellant from said Appellee Peerless Oil and Gas Company under subsisting stipulation in effect at the time of the making of said Order 19515 is immediately, without interruption, transported in interstate commerce for resale and said order, being directed solely against Appellant and increasing twofold the price of gas in said field, casts an undue burden upon and discriminates against the interstate operations and business of Appellant.

SUMMARY OF ARGUMENT ON QUESTIONS PRESENTED

I.

The Oklahoma Supreme Court has decided that 52 O. S. 1941, 239, authorized Commission, by implication of law, to fix the price of gas when found necessary to prevent waste and protect the interest of the public and of all those

having a right to produce gas in the pool (R. 895, 910). Price fixing or the price of natural gas is not even mentioned in 52 O. S. 1941, 239. The want of such provisions in a statute to make it constitutional cannot be cured by courts inserting them in judgments under it. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 21[illegible] U. S. 132, 144, 53 L. Ed. 441, 446. The defect in the law cannot be cured by the construction given to the words by the court having final authority to declare their intent. The language of the questioned section (52 O. S. 1941, 239) is plain and unambiguous. The act relates solely to the conservation of natural gas as a commodity and not to the price or proceeds thereof. No court is at liberty to construe language so plain as to need no construction. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 80 L. Ed. 62, 66. To permit a state court of last resort to insert words into a statute not placed therein by the legislature would open an easy method of avoiding the jurisdiction of this Court. *Terre Haute & Indianapolis R. R. Co.* v. *State of Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129. Such non-federal ground of decision is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 654, 86 L. Ed. 1090, 1095. Courts are without authority either to declare an economic price-fixing policy or, when it is properly declared by the legislature, to override it. *Nebbia* v. *New York*, 291 U. S. 502, 537, 79 L. Ed. 940, 957. The wisdom, need or appropriateness of such legislation, when properly declared, is not the concern either of the courts or of administrative agencies, but primarily rests where the Constitution of Oklahoma

placed it—in the state legislature. Art. IV, Sec. 1, Okla. Const.; *Olsen* v. *Nebraska*, 313 U. S. 236, 246, 85 L. Ed. 1305, 1310.

The Oklahoma Legislature, in 1935, by statute 52 O. S. 1941, 204, in ratifying the provisions of the Interstate Compact to Conserve Oil and Gas, consented to by the Congress of the United States (1935), 49 Stat., Ch. 781, pp. 939-941, declared against the economic policy of gas price fixing. This declaration of policy against price fixing was reiterated by the Legislature in 1936, 1939, and again in 1941. Laws 1936, Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 52, Ch. 3. Three separate attempts by interested parties to have the state Legislature expressly confer gas price-fixing powers upon the Corporation Commission of Oklahoma have been rejected by it. 1945 House Journal, 1482, 1573, 1574, 2070, and 2361; 1947 House Journal, 1657, 1788, 1789, 2769, and 2770; 1949 Senate Journal, 177, 416, 449, 473, 474, 549, 587, 588, and 589. The statute, 52 O. S. 1941, 239, construed as authorizing the Corporation Commission of Oklahoma, by necessary implication, to fix a price consideration in the taking and purchasing of gas when found necessary by Commission to prevent waste, protect correlative rights and the interest of the public, does not contain even a semblance of a standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570. Compare *Fahey* v. *Mallonee*, 232 U. S. 245, 249, 91 L. Ed. 2030, 2036, 2037. Under the Oklahoma Court's interpretation of the ques-

tioned section, 52 O. S. 1941, 239, Commission is possessed of an absolute, unregulated and undefined discretion to fix any price it deems wise or expedient. The act as construed and applied to Appellant violates the 14th Amendment. *Saia v. New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577. The interpretation of the Oklahoma Supreme Court bestows arbitrary gas price-fixing powers upon Commission, has no reasonable relation to a proper exercise of the expressly declared legislative purposes, is contrary thereto and thereby contravenes the due process clause of the Federal Constitution. *Nebbia v. New York*, 291 U. S. 502, 537, 79 L. Ed. 940, 957.

II.

Even if this Court rejects the contentions of Appellant under the First Proposition, the undisputed and indisputable evidence in the record clearly shows that the purpose of Order 19514 was not the prevention of waste of gas, current or imminent, as defined by the Oklahoma Statute, nor was it to protect the interest of the public or the correlative rights of those having a right to produce gas as a commodity (R. 63-321). Rather, the apparent objective was, as reflected by Commission's plebiscite (R. 112-117), to confer economic benefits upon royalty owners and certain producers because Commission entertained the view that the price of gas in the Hugoton Field was too cheap (R. 475, 476). There is not one scintilla of evidence in the record of physical waste of gas in the Guymon-Hugoton pool, current or imminent, as defined by statute, in Oklahoma. 52 O. S. 1941, 237; 1945 Sess. Laws, Title 52, Ch. 3, Sec. 3, pp. 156, 157; Appendix F, p. xx, and Appendix F, pp. xxv,

xxvi. The statute, by its term, does not cover economic waste and no evidence of waste, as defined or contemplated by the Oklahoma Statute, appears in the record. The testimony of gas men, not economists, to the effect that the intrinsic value of gas when compared with fuel oil, coal and other fuels, based upon assumed values, respectively, was 10¢ per thousand cubic feet at the wellhead in said pool (R. 161, 163, 164, 118, 119, 282, 283) and the further testimony that in order to prevent waste and conserve gas as a natural resource it was their opinion the minimum price of natural gas in said pool should not be less than 10¢ per thousand cubic feet (R. 280, 283, 163, 164, 118, 119), and their opinion that any price less than 10¢ per thousand cubic feet was waste (R. 297, 298, 163, 164, 118, 119) is wholly incompetent and unsubstantial. *Winans* v. *The N. Y. & Erie R. Co.*, 21 How. 88, 101, 16 L. Ed. 68, 71; 20 Am. Jur., pp. 672, 696, Secs. 799, 829; *Rosenbaum* v. *State*, 131 Ark. 251, 199 S. W. 388, 389, L. R. A. 1918B, 1109. Such opinion evidence is based upon assumption, not facts. It is so highly speculative and remote that it forms no substantial basis in law for price fixing, particularly in the absence of a pertinent legislative declaration so authorizing. On appeal from a state court, when the existence of a federal right or immunity depends upon the appraisal of undisputed, admitted or indisputable facts of record, or where reference to the facts is necessary to a determination of the precise meaning of the federal right or immunity as applied, this Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted federal right or immunity is to be sustained. *Hooven & Allison* v.

Evatt; 324 U. S. 652, 659, 89 L. Ed. 1252, 1260; *Fiske* v. *Kansas,* 274 U. S. 380, 385, 71 L. Ed. 1108, 1111.

It is plain from the record in this case that Commission has proceeded upon the assumption that it was authorized to increase the price of gas in the field because it believed the price being paid to certain producers and royalty owners was too cheap (R. 475, 476) and that the private benefit of royalty owners and certain producers required Commission, even in the absence of legislative authority, to use its powers as a public body for their pecuniary advantage. Compare *Hood* v. *Du Mond,* 336 U. S. 525, 93 L. Ed. 865. The application thus given to the statute under the relevant facts in the record deprives Appellant of its property for the private use and benefit of royalty owners and certain producers and is a taking of property without due process of law, forbidden by the 14th Amendment. *Chicago, St. P. M. & O. R. Co.* v. *Holmberg,* 282 U. S. 162, 167, 75 L. Ed. 270, 273; *Nashville C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 429, 79 L. Ed. 949, 963; *Panhandle Eastern Pipe Line Co.* v. *State Highway Comm. of Kansas,* 294 U. S. 613, 79 L. Ed. 1090; *Treigle* v. *Acme Homestead Asso.;* 297 U. S. 189, 197, 198, 80 L. Ed. 575, 580; *Thompson* v. *Consolidated Gas Util. Corp.,* 300 U. S. 55, 80, 81 L. Ed. 510, 524.

Order 19514 is limited in its application and effect solely to the Guymon-Hugoton gas pool (R. 11-18). The record shows numerous other gas fields in Oklahoma (Exhibit 68, R. 636A) and that Appellant is a producer and purchaser of gas therein, *id.* There are no practical differences between conditions and circumstances in the Guymon-

Hugoton pool and those in other pools of the state, appearing in this record, that would make price-fixing or change of measurement base necessary in one pool to the exclusion of other gas pools in the state (R. 291). The order being limited solely to the Guymon-Hugoton pool to the exclusion of other gas pools in the state, violates the equal protection clause of the Federal Constitution. The classification is unreasonable and arbitrary. *Barbier* v. *Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668; *Southern R. Co.* v. *Greene*, 216 U. S. 400, 417, 54 L. Ed. 536, 541; *Maryland Coal & Realty Co.* v. *Bureau of Mines of State*, 69 Atl. (2d) 471, 477; *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110, 93 L. Ed. 533, 539; *Met. Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. The ultimate test is not whether one gas field differs from another gas field but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, in this case, price and measurement base; *Met. Casualty Ins. Co.* v. *Brownell, supra.* The selective application of a regulation to a particular class denies the equal protection of the law if it rests on grounds wholly irrelevant to the achievement of the regulation's objective. *Kotch* v. *River Port Pilot Commrs.*, 330 U. S. 552, 556, 91 L. Ed. 1093, 1097.

The Legislature, in the last line of the statute 52 O. S. 1941, 239, Appendix F, pp. xxi, xxii, expressly directs Commission in promulgating its regulations "to prevent unreasonable discrimination in favor of any one common source of supply as against another." Where the price of gas in one field is increased and the measurement base changed and in other gas fields of the state is left unregu-

lated the result is conducive to discrimination. It is possible, as condemned by the Oklahoma Court in this case, to take more gas in one place on a low cost than in another place on a higher cost (R. 909, 910). It is clear, therefore, that the price-fixing order of Commission in question here promotes rather than prevents discrimination and therefore contravenes the equal protection clause as well as the due process clause of the Federal Constitution.

III.

As decided by the Supreme Court of Oklahoma, Order 19514 is based upon 52 O. S. 1941, 239, a section of the 1915 Gas Conservation Act (R. 895, 910), see Appendix F, pp. xxi, xxii. For a violation of the order Appellant may be punished as for contempt, 52 O. S. 1941, 241, as in proceedings under Commission's control of public service corporations, Art. IX, Sec. 19, Okla. Const. The offender may be fined by Commission for such contempt, such sum not exceeding $500.00, as the Commission may deem proper, or such sum in excess of $500.00 as may be prescribed or authorized by law; and each day's continuance of the violation constitutes a separate offense, *id.* It may also constitute a misdemeanor, 52 O. S. 1941, 247.

An examination of the Oklahoma Court's opinion in this case discloses that although Appellant contended in the State Court this order was void for vagueness, indefiniteness and uncertainty, that Court neglected to clarify the meaning of the order (R. 895-917). Appellant in its petition for rehearing in the State Court again pointed out to the Court the vagueness, indefiniteness and uncertainty

of this order (R. 931, 932). Compare *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137, 139, 68 L. Ed. 593, 596. A statute (or order) which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally* v. *General Construction Co.,* 269 U. S. 385, 393, 70 L. Ed. 322, 329. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no standard or rule at all. *Champlin Rfg. Co.* v. *Corp. Comm.,* 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 463, 71 L. Ed. 1146, 1155.

Must Appellant be required to guess at the meaning of the Commission's order, and the extent to which it may be applied, under dire penalties for failure to correctly comprehend the meaning, extent and operation of the order? What does the Commission mean by the word "take"? Does it mean produce or purchase, or both activities? Must Appellant, in order to obtain gas by purchase, pay its vendors 7¢ per mcf on the prescribed pressure base plus a gathering charge, instead of the contract price of 4½¢ per mcf for gathered gas on a different pressure base or is it required only to pay its vendors for royalty gas on the basis of the order? With respect to Appellant's produced gas that it utilizes in the drilling of wells and as fuel for its field compressors or that it utilizes for other lawful purposes, if the order applies to such gas, how will the Appellant comply with the order? Must Appellant sell all of its gas instead of utilizing a portion of it?

Appellant submits that to require it, in view of its extensive operations and investments and its duty to the public to maintain a constant uninterruptible supply of gas to its markets, to guess at the meaning, extent and operation of Commission's Order 19514, denies Appellant due process of law. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329; *United States* v. *Northern Pac. Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243.

IV.

52 O. S. 1941, 233, does not contain any standard at all to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current or going price prevailing in the field at the time and place of the tender, taking or purchase of gas therein, where the parties thereto cannot agree upon the terms thereof. The language of the statute, 52 O. S. 1941, 233, reads, "* * * in case they cannot agree, at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing." To constitute a proper standard within the meaning of the due process clause, the power to be exercised must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least some reasonably ascertainable channel. The test is whether the statute is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v.

Frink Dairy Co., 274 U. S. 445, 463, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. Is it possible for Appellant or any reasonably intelligent and prudent person to read this statute and be able therefrom to ascertain the extent of Commission's price-fixing authority?

In the very recent case of *Saia* v. *New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577, this Court in considering a city ordinance having the force of a statute which forbade the use of sound amplification devices except with the permission of the Chief of Police, said, "there are no standards prescribed for the exercise of his discretion." This Court struck down the ordinance as unconstitutional. As shown by the reasoning of this Court in *Fahey* v. *Mallonee*, 332 U. S. 245, 251, 91 L. Ed. 2030, 2037, the purpose of the plain language of this statute is clearly disclosed to authorize any price or terms of purchase or taking Commission would propose or prescribe as wise and beneficent in settling the claimed dispute between Appellant and Appellee Peerless Oil and Gas Company. Apparent it is that this statute contains no semblance of a standard or guide for Commission to follow in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States*, 294 U. S. 495, 79 L. Ed. 1570. It is therefore void because it confers upon Commission arbitrary, capricious, and unreasonable gas price-fixing powers in violation of the due process clause of the 14th Amendment. *Nebbia* v. *New York*, 291 U. S. 502, 525, 539, 78 L. Ed. 940, 947.

The undisputed evidence in the record shows that at the time Peerless tendered gas from its wells to Cities

Service for purchase there existed in said field subsisting basic Order 17867 of Commission (R. 543-549). This order as construed by the Supreme Court of Oklahoma (*Application of Moran*, 200 Pac. [2d] 758) required Peerless, in order to have its acreage considered or held to be producing acreage, to tender in good faith the gas from its wells to Cities Service at the going price in the field (R. 543).

It cannot be disputed that at said time there was in full force and effect Revised Maximum Price Regulation No. 436 (R. 748-790) promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended; 50 U. S. C. A. 901, *et seq.*, making it unlawful for Peerless to tender its gas to Cities Service at a price more than 4¢ per thousand cubic feet (R. 745-747).

The Commission, in this case, as recognized by the Supreme Court of Oklahoma (R. 905), has promulgated its legislative order (R. 11-18) and applied it retroactively to Appellant by its judicial order (R. 19-29). Compare *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158. That this cannot be done to the detriment of vested property rights and existing defenses accruing before the promulgation of Order 19514 is well settled. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 198, 80 L. Ed. 575, 581; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; *Fidelity & Deposit Co. of Maryland* v. *Arenz*, 290 U. S. 66-68, 78 L. Ed. 176, 178. The statutes in this case do not authorize Commission to issue retroactive orders. The principle against retroactive legislation is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally

with the statute and accordingly the legislative field price-fixing order of Commission cannot be applied retroactively as was done by Commission in Order 19515, unless the statute specifically so authorizes. *Miller* v. *United States*, 294 U. S. 435, 439, 79 L. Ed. 977, 981.

V.

For many years this Court's decision in the case of *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, clearly pointing out the distinction between a judicial and legislative inquiry, has been recognized and followed by the various state courts. Oklahoma has been no exception. *Associated Indtstries* v. *Industrial Welfare Comm.*, 185 Okla. 177, 90 Pac. (2d) 899, 914. With respect to procedural due process, this Court has said:

> "*If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned was lacking, the proceeding is void and must be set aside*" (Italics supplied). *Kessler* v. *Strecker*, 307 U. S. 22, 34, 83 L. Ed. 1080, 1090.

Compare *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433. The Oklahoma Court, except in the case at bar, has recognized these requirements of procedural due process. *Skinner* v. *State*, 189 Okla. 235, 115 Pac. (2d) 123.

The undisputed evidence in the record in this case shows that Commission refused to inform Appellant in advance of the hearing what rules of practice and procedure

it would follow and apply (R. 64). It allowed the misjoinder of judicial and legislative matters and consolidated same for hearing at the same time (R. 179, 180, 181). It allowed Commissioners of the Land Office to intervene in the proceedings (R. 168, 176, 178, 181, 574) and conducted a plebiscite of land and royalty owners while the case was in hearing (R. 112-117). It filed petitions with the Federal Power Commission while the hearing was in progress, stating Commission was interested in increasing the price of natural gas in the pool (R. 475, 476). Commission allowed its Conservation Attorney, as well as the Attorney for Commissioners of the Land Office, to take an active part in the hearing of the private dispute between Peerless and Cities Service (R. 182, 332, 333); admitted incompetent, irrelevant and hearsay evidence and testimony (R. 161, 163, 164, 118, 119, 282, 283). It refused to segregate and separate the testimony so Cities Service could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case (R. 339). It refused to recognize, apply and abide by its own subsisting orders (R. 543, 548).

By reason of all these things Appellant asserts it has been denied procedural due process of law in accordance with the provisions of the 14th Amendment at the hearing before Commission leading to the issuance of Order 19515. Compare *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1102; *Morgan* v. *United States*, 304 U. S. 1-15, 82 L. Ed. 1129, and cases there cited.

VI.

In the light of the undisputed evidence in the record, it is apparent that the practical effect of Order 19514 is to prohibit the gas in the Guymon-Hugoton pool from being the subject of interstate commerce unless local economic interests are aided to an extent of practically twofold the going price thereof. *Hood* v. *Du Mond,* 336 U. S. 657, 93 L. Ed. 682.

In the case at bar the nature and effect of the interference with interstate commerce by the State of Oklahoma is similar to that which would have resulted from the conservation measure attempted by Oklahoma in the case of *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 260; 55 L. Ed. 716, 728. There the avowed conservation measure would have prohibited natural gas from being the subject of interstate commerce, for the purpose of bestowing benefits upon the inhabitants of the state. Here, under the guise of the prevention of waste of natural gas the State of Oklahoma seeks, not necessarily to bar, but to heavily burden interstate commerce, for the purpose of bestowing pecuniary benefits upon a very small and selected segment of its population.

Practically all of the gas Appellant produces and purchases goes into interstate commerce (R. 389-390). The effect on interstate commerce is apparent; the harm to the nation immediate and clear. Compare *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1; 73 L. Ed. 147, 154; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; 67 L. Ed. 1117; *Freeman* v. *Hewett,* 329 U. S. 249, 91 L. Ed. 265. The

orders as applied to Appellant under the undisputed evidence in the record unduly burden and discriminate against interstate commerce and the interstate operations of Appellant. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 79 L. Ed. 1032; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

ARGUMENT

I.

Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, 239, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the State Legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

This proposition presents the narrow question of what the Oklahoma Legislature did; not what it could do. Courts are without authority either to declare an economic price-fixing policy or, when it is properly declared by the Legislature, to override it. *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957. The wisdom, need, or appropriateness of such legislation, when properly declared, is not the concern either of the courts or of administrative agencies but primarily rests where the Constitution of Oklahoma placed it—in the State Legislature. Art. IV, Sec. 1, Okla. Const.; *Olsen* v. *Nebraska*, 313 U. S. 236, 246, 85 L. Ed. 1305, 1310. The language of the questioned section (52 O. S. 1941, 239), as well as the entire Act of 1915 of which it is a part, is plain and unambiguous. The Act relates solely to the conservation of natural gas as a commodity and not to the price or proceeds thereof. There is no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes, and where the words are sufficient in and of themselves to determine the purpose of the legislation, the plain

meaning will be followed by the courts. *United States* v. *American Trucking Assn.*, 310 U. S. 534, 543, 84 L. Ed. 1345, 1350, 1351; *Ex Parte Joseph Collett*, 337 U. S. 51, 61, 93 L. Ed. 1207, 1211. No court is at liberty to construe language so plain as to need no construction or to refer to committee reports or administrative interpretations where there can be no doubt of the meaning of the words used. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 80 L. Ed. 62, 66.

From the plain language of this Gas Conservation Act it is apparent that the Oklahoma Legislature has not therein declared any price-fixing policy with respect to natural gas. Price fixing or the price of natural gas is not even mentioned in the entire Act. The want of such provisions in a statute to make it constitutional cannot be cured by courts inserting them in judgments under it. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446. The defect in the law cannot be cured by the construction given to the words by the court having final authority to declare their intent. *Louisville & N. R. Co.* v *Central Stockyards Co., supra.* See dissenting opinion of Justice Gibson in the case at bar (R. 927). To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Terre Haute & Indianapolis R. R. Co.* v *State of Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129. Of course, if the language of the statute is ambiguous or seemingly not plain, so as to justify construing the same, a State Court's interpretation of the statute may be justified and binding upon this Court. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 219, 58 L. Ed. 1284, 1286. Yet where the construction of the statute

by a state court is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process or an attempt on its part to avoid the jurisdiction of this Court, the interpretation is not binding upon this Court. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 654, 86 L. Ed. 1090, 1095; *Radio Station W. O. W., Inc.* v. *Johnson,* 326 U. S. 120, 129, 89 L. Ed. 2092-2100. The Oklahoma Supreme Court's construction of the statute in question may not be utilized to cloak an infringement of the rights of Appellant under the Federal Constitution. *Bain Peanut Co.* v. *Pinson,* 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491. There is a vital and material difference between interpolating into a statute language not placed therein by the Legislature and the construing of a statute where the meaning thereof is not plain, as pointed out by Justice Holmes. *International Harvester Co.* v. *Kentucky, supra.* In the case of *Interstate Commerce Comm.* v. *Cinn. N. O. & T. P. R. Co.,* 167 U. S. 479, 494, 495, 505, 42 L. Ed. 243, 253, this Court had before it a controversy over the asserted power of the Interstate Commerce Commission to fix railroad rates under the Act of 1887. The Act there under consideration provided that "all charges * * * shall be just and reasonable"; and further provided that "* * * the Commission is hereby authorized and required to execute and enforce the provisions of this Act." The question debated was whether the Act vested in the Commission the power and duty to fix rates. This Court said, on page 494, U. S. Reports:

> "The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties."

In disposing of Commission's contentions, the Court said, on pages 494, 495, of the opinion:

> "*The grant of such a power is never to be implied.* The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly of commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, *that no just rule of construction would tolerate a grant of such power by mere implication.* Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many states of this Union" (Italics supplied).

This is exactly the same situation as presented by the statute here under consideration, except that the statute here under examination does not even mention reasonable charges or prices. On page 505, this Court further said:

> "The power to prescribe a tariff of rates for carriage by common carrier is a legislative and not an administrative or judicial function, * * * is a power of supreme delicacy and importance * * *. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, *and, if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction but clear and direct*" (Italics supplied).

Compare *Sunshine Dairy* v. *Peterson*, 183 Ore. 305, 193 Pac. (2d) 543.

This Court, in the exercise of its appellate jurisdiction over cases appealed from state courts, takes judicial notice of whatever was a matter of law or fact before the court from which the appeal is taken, and whatever was a matter of fact before the Supreme Court of Oklahoma is a matter of fact before this Court; *Hanley* v. *Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, 537. The Supreme Court of Oklahoma takes judicial notice of legislative proceedings; *Dyer* v. *Shaw*, 139 Okla. 165, 281 Pac. 776, 777. On March 14, 1945, House Bill No. 431 was introduced in the Oklahoma Legislature by Hughes of the House representing Texas County, in which county is located the Guymon-Hugoton Gas Field; 1945 House Journal 1425 (Appendix A). This bill, in language open to no misconstruction, but clear and direct, would have conferred upon Commission gas price-fixing powers (Appendix A). The bill failed to pass; 1945 House Journal 1482, 1573, 1574, 2070, 2361. Again on April 2, 1947, House Bill No. 439 was introduced in the Oklahoma Legislature by Field and Musgrave of the House and Leonard of the Senate; 1947 House Journal 1604 (Appendix B). Field of the House and Leonard of the Senate represented an area of the State ineluding Texas County and the Guymon-Hugoton Gas Field. This bill, in clear and concise language, would have conferred upon the Commission gas price-fixing powers (Appendix B). It failed to pass; 1947 House Journal 1657, 1788, 1789, 2769, 2770. In 1949, another effort was made to confer upon Commission gas price-fixing powers (Appendix C). On February 3, 1949, Senate Bill 121 was introduced in the Oklahoma Legislature by the same persons who introduced the bill in 1947; 1949 Senate Journal 172. This bill would have clearly con-

ferred upon Commission gas price-fixing powers (Appendix C). This bill also failed to pass; Senate Journal 177, 416, 449, 473, 474, 549, 587, 588, 589. An unsuccessful attempt by interested parties to obtain express authority from the Legislature indicates the previous absence of implied authority. *Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 351, 352, 85 L. Ed. 881, 884. Since price fixing is restrictive of a free economy, the rights claimed to be attached thereto must be strictly construed; *United States* v. *Masonite Corp.*, 316 U. S. 265, 280, 86 L. Ed. 1461, 1476.

It is academic law that administrative agencies are purely creatures of legislation without inherent or common law powers. *Sutherland Statutory Constr.*, 3rd Ed., Horack, Vol. 3, Sec. 6603. In dealing with statutes conferring power upon the Corporation Commission, the Oklahoma Supreme Court, except in the instant case, has consistently limited the power and authority of the Corporation Commission of Oklahoma to powers plainly granted to it by the Legislature. *Application of Central Air Lines* (1947), 199 Okla. 300, 185 Pac. 919. In the opinion the Court said:

> "Under this construction, the expressed delegation of what is to be included leaves no room for enlargement through implication" (Pacific citation 924).

Compare *Chicago, R. I. & P. Ry. Co.* v. *State* (1932), 158 Okla. 57, 12 Pac. (2d) 494, 497; *Sterling Rfg. Co.* v. *Walker* (1933), 165 Okla. 45, 25 Pac. (2d) 312, 320, 321; *Wilcox Oil & Gas Co.* v. *Walker* (1934), 169 Okla. 33, 32 Pac. (2d) 1044, 1046; *Worley* v. *French* (1938), 184 Okla. 116, 85 Pac. (2d) 296; *Board of Education of Okla. City* v. *Cloudman* (1939), 185 Okla. 400, 92 Pac. (2d) 837; *Tharel*

v. *Board of County Commrs. of Creek County* (1940), 188 Okla. 184, 107 Pac. (2d) 542; *Pannell* v. *Farmers Union Cooperative Gin Assn.* (1943), 192 Okla. 652, 138 Pac. (2d) 817, 820; *Yochman* v. *County Election Board of Creek County et al.* (1947), 198 Okla. 588, 180 Pac. (2d) 831. While it is recognized that a state Supreme Court can reverse its position and change its former local law rule, the foregoing cases lend support to Appellant's contention that in the instant case the Court's construction is the utilization of local grounds of decision to cloak an infringement of rights of Appellant under the Federal Constitution. *Bain Peanut Co.* v. *Pinson*, 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491.

The Oklahoma Supreme Court in its opinion in the case at bar said:

> "Commission has heretofore exercised its power of fixing prices at which natural gas may be produced and taken. As early as 1920, after the prescribed notice and hearing, the Commission fixed the price of 9¢ per M. C. F. for gas in the Cushing Field and in 1944, acting specifically in view of the national emergency, the Commission, after notice and hearing, authorized the taking of natural gas for the manufacture of carbon black, but fixed the price to be paid for the gas so produced and used. And it was also specified that the continued effectiveness of the permit should depend on the maintaining of the fixed price" (R. 912).

The carbon black order appears in the record, Exhibit 10 (R. 550-554). The Cushing order referred to was not introduced in evidence and does not appear anywhere in the record, the Court apparently taking judicial notice thereof. For the convenience of the Court, the Cushing order is set

out in full in Appendix D. The Court concluded, because Commission had by such orders at or near the time of enactment of the statute in question, 52 O. S. 1941, 239, placed a construction on the statute with respect to price fixing which had long been acquiesced in, that such construction afforded a just medium for its judicial interpretation of price-fixing authority into the statute (R. 912-913). Even a superficial examination of the orders will reflect that neither of the orders concerns or was based upon the statute here under examination, nor do the orders relate to the production of gas. The Cushing order is clearly *quasi judicial* in character. *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158. The same is true of the carbon black order. A careful reading of the Cushing order reflects from its clear language that the jurisdiction Commission decided it possessed was based upon the public utility statutes of Oklahoma, 52 O. S. 1941, 151, *et seq.*, not involved in this action, and the dispute statute, 52 O. S. 1941, 233, not dealing with field price, the constitutional validity of which latter statute is also being questioned in this appeal and will be more fully examined and discussed hereafter in this brief. The carbon black order plainly shows on its face that it was a war emergency order based upon no statute; certainly not upon 52 O. S. 1941, 239. When this Court has completed an examination of the record and of the two orders relied upon by the Oklahoma Court in its opinion, it will undoubtedly be convinced that Commission has at no time since the enactment of the 1915 Conservation Act, of which 52 O. S. 1941, 239, is a part, interpreted the Act as authorizing gas price fixing by Commission for the purpose of preventing waste or protecting

the public interest and correlative rights. In a most recent case, *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 513, 514, 93 L. Ed. 1499, 1509, this Court pointed out that failure of Commission to use an important power for so long a time indicates that the Commission did not believe the power existed, clearly indicating in the light of that history a court should not by an extravagant, even if abstractly possible mode of interpretation, push powers into a statute not placed therein by the Legislature. This reasoning is reinforced by the unsuccessful attempts, in 1945, 1947 and 1949, of interested parties to secure gas price-fixing powers from the Legislature for Commission (Appendices A, B, C). This Court should not, however, overlook or disregard the fact that the plain language of the statute relied upon does not grant Commission price-fixing powers. Where this is true no amount of administrative interpretation is binding upon the courts. *Texas & P. R. Co.* v. *United States,* 289 U. S. 627, 640, 77 L. Ed. 1410, 1423. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315, 77 L. Ed. 796, 807, is a case where this Court clearly indicated that administrative construction comes into being only where the language of the statute is indefinite and doubtful. In *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 264, 78 L. Ed. 302, 306, this Court said:

> "But in any case there is no ambiguity or uncertainty in the statute with respect to the point urged by the Government, and, in carrying it out as written, there is no administrative difficulty which would call for construction. The rulings * * * rest upon a proposition so plainly contrary to law and so plainly in con-

flict with the statute as to leave them without weight as administrative constructions of it."

The ruling of Commission and the approval of the Oklahoma Court thereof are so plainly contrary to law, so plainly in conflict with the statute with respect to the point of price fixing as to leave any administrative construction without weight. Compare *Mathews v. Mathews*, 186 Okla. 245, 96 Pac. (2d) 1054.

Statutes should be construed, so far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of administrative officers, to the end that ours may continue to be a government of written laws rather than one of official grace; *United States v. Northern Pacific Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243. May Appellant here inquire whether it or any reasonably prudent and intelligent person could read the statute in question, 52 O. S. 1941, 239, and fairly forecast the extent of Commission's gas price-fixing powers thereunder? Appellant submits that the interpretation of the statute by the Oklahoma Supreme Court leaves the price of gas to the unlimited and unrestricted discretion of Commission and by reason thereof is arbitrary and denies Appellant, as well as other producers and purchasers, due process of law. *Nebbia v. New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957.

The Oklahoma Legislature, in 1935, by statute 52 O. S. 1941, 204, in ratifying the provisions of the Interstate Compact to Conserve Oil and Gas, consented to by the Congress of the United States (1935), 49 Stat., Ch. 781, pp.

939-941, declared against the economic policy of gas price fixing. In successive Acts the provisions of the Compact have been extended with the consent of Congress (1937), 50 Stat., Ch. 572, pp. 617-619; (1939), 53 Stat., Ch. 337, pp. 1071-1074; (1941), 55 Stat., Ch. 400, pp. 666-669; (1943), 57 Stat., Ch. 194, pp. 383-387. The Oklahoma Legislature, in 1936, 1939, and again in 1941, reiterated its policy against gas price fixing; Laws 1936, Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 52, Ch. 3. The purpose of the Compact, according to the plain language of Article V thereof, is "limited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations." The construction of such a Compact, sanctioned by Congress, involves a federal question and the meaning thereof, including the public policy of the respective compacting states, is, in the final analysis, for this Court to determine; *Delaware River Joint Toll Bridge Comm.* v. *Colburn,* 310 U. S. 419, 427, 84 L. Ed. 1287, 1289. Compare *Stanley et al.* v. *Mowery* (Okla., 1949), 207 Pac. (2d) 277.

The statute in question, 52 O. S. 1941, 239, construed as authorizing Commission by necessary implication to fix a price consideration in the taking and purchase of gas when found necessary by Commission to prevent waste, protect correlative rights and the interest of the public, contains no semblance of an intelligible or adequate standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg. Co.* v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570. The Act here under examination, as construed by the Oklahoma Supreme Court, is not

merely to deal with practices which offend against existing laws that could be the subject of judicial condemnation without further legislation or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose of the statute as interpreted by that Court is clearly disclosed to authorize new and controlling regulations by Commission which would embrace what the formulators, the Commission, would propose or prescribe as wise and beneficent measures for the government of the gas industry. Compare *Fahey* v. *Mallonee*, 332 U. S. 245, 249, 91 L. Ed. 2030, 2036, 2037. The decision of the Oklahoma Supreme Court that the prevention of waste, protection of the interest of the public and of correlative rights are standards to guide Commission in fixing the price of gas is clearly false logic and untenable. The prevention of waste, the protection of the interest of the public and of correlative rights are clearly legislative objectives or policies with respect to the conservation of gas as a natural resource or commodity; *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 69, 81 L. Ed. 510, 518. To constitute a standard the power must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least reasonably ascertainable channel. The test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Rfg. Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 464, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. There is not a semblance of a standard in the statute.

For instance, the Legislature does not even require Commission to fix an equitable, fair or reasonable price. Under the Oklahoma Court's interpretation of the Act, Commission is possessed of an absolute, unregulated and undefined discretion to fix any price it deems wise or expedient. The Act as construed and applied to Appellant violates the 14th Amendment; *Saia* v. *New York*, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577. Even a cursory examination of the decision of the Oklahoma Supreme Court, in the light of the plain language of the statute, will reflect that the non-federal ground of its decision is so colorable and unsubstantial as to be in effect an evasion of the constitutional issue of due process and an attempt on its part to avoid the jurisdiction of this Court. *Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758; *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 654, 86 L. Ed. 1090, 1095; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540, 74 L. Ed. 1023, 1030; *Radio Station W. O. W., Inc.* v. *Johnson*, 326 U. S. 120, 129, 89 L. Ed. 2092, 2100. The interpretation of the Act by the Supreme Court of Oklahoma bestows arbitrary gas price-fixing powers upon Commission, has no reasonable relation to a proper exercise of the expressly declared legislative purposes, is contrary thereto, and thereby contravenes the due process clause of the Federal Constitution; *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957.

II.

If the Corporation Commission is lawfully empowered by 52 O. S. 1941, 239, for the purpose of conservation and in the public interest to fix a minimum price for natural gas in Oklahoma, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a producer and purchaser of natural gas prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19514, make the findings it did in support thereof, and limit the effect and operation of said Order to the Guymon-Hugoton Field to the exclusion of other Oklahoma gas fields?

For purposes of Appellant, here, it is assumed that the construction and coverage of the statute as declared by the highest court of the state fixes its meaning for the purpose of determining its constitutionality by this Court and that this Court may reject Appellant's contentions under Proposition I. It may therefore be stated that the Oklahoma Supreme Court decided, in the case at bar, that 52 O. S. 1941, 239, authorized Commission to fix the price of gas when found necessary to prevent waste or protect the interest of the public and of all those having a right to produce gas in the pool (R. 895, 910); that the Court also based authority of Commission solely on 52 O. S. 1941, 239, and said Commission was limited in its use of price-fixing powers under the statute to the effecting of these expressed purposes (R. 910-911). In other words, under the Oklahoma Court decision, if the record in this case and the findings of Commission show a purpose other than the prevention of waste, protection of the interest of the public

or safeguarding correlative rights of producers, then the price-fixing order here under examination is clearly unauthorized and invalid. The immediate problem facing this Court necessitates a review of the evidence and Commission's findings purportedly based thereon to ascertain whether the order was issued to prevent waste, protect the interest of the public and preserve correlative rights of producers. All other findings and evidence are therefore irrelevant because the Oklahoma Supreme Court by its interpretation of the statute relied upon has limited the use of price fixing to those certain specified purposes. *Greenough* v. *Tax Assessors of Newport*, 331 U. S. 486, 497, 91 L. Ed. 1621, 1630. On appeal from a state court, when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed, admitted or indisputable facts of record, or where reference to the facts is necessary to a determination of the precise meaning of the federal right or immunity as applied, this Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted federal right or immunity is to be sustained. *Hooven & Allison* v. *Evatt*, 324 U. S. 652, 659, 89 L. Ed. 1252, 1260; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259; *Fiske* v. *Kansas*, 274 U. S. 380, 385, 71 L. Ed. 1108, 1111. Compare *Pennekamp* v. *Florida*, 328 U. S. 331, 345, 90 L. Ed. 1295, 1303; *Oyama* v. *California*, 332 U. S. 633, 636, 92 L. Ed. 249, 254.

When Order 19514 and the pertinent findings are tested in the light of the undisputed and indisputable evidence it clearly appears that the reason for the promulgation of the order was not the prevention of waste of gas, current or

imminent, as defined by the Oklahoma Statutes, nor was it to protect the interest of the public or the correlative rights of those having a right to produce gas. Rather, the apparent objective was as reflected by Commission's plebiscite (R. 112-117) to confer economic benefits upon royalty owners and certain producers because Commission entertained the view that the price of gas in the Hugoton Field was too cheap (R. 475-476). If, as testified to by witnesses of Peerless not qualified as economists, the taking of gas from the field at any price less than 10¢ per mcf was waste (R. 118, 119, 163-164, 282, 283), the order of Commission fixing a price lower than 10¢ is certainly evidence that the intent and purpose of the order was not the prevention of waste. There is not one iota of evidence in the record of physical waste of gas, current or imminent, as defined by statute in Oklahoma, 52 O. S. 1941, 237; 1945 Sess. Laws, Title 52, Ch. 3, Sec. 3, pp. 156-157; Appendix F. On the contrary, the undisputed evidence shows no physical waste (R. 278-313, 472-474, 476-482, 617). The statute by its terms does not cover economic waste and no evidence of waste as defined by the Oklahoma Statute appears in the record. The opinion evidence of gas men, not economists, is based upon assumption, not facts. It is so highly speculative and remote that it forms no substantial basis in law for price fixing, particularly in the absence of a pertinent legislative declaration.

To permit an expert to define the ordinary meaning of the word "waste" and apply that opinion without fact basis is, to say the least, a plain usurpation of the powers of the court, 20 Am. Jur. 696, Sec. 829. Even lawyers are

not permitted to so testify, 20 Am. Jur. 672, Sec. 799. This Court has given recognition to this well-established and long recognized rule. *Winans* v. *The N. Y. & Erie R. Co.* (1859), 21 How. 88, 101, 16 L. Ed. 68, 71. In an excellent opinion on this very question, it is said:

> "It is a familiar rule, without exception, that the opinion of a witness not founded on science or in relation to any special business, art, or trade requiring peculiar knowledge, but given purely as the witness' theory concerning an issue of morals or duty, is inadmissible, whether such opinion be by a professional or non-professional witness." *Rosenbaum* v. *State,* 131 Ark. 251, 199 S. W. 388, 389, L. R. A. 1918B, 1109.

At the time of the hearing and issuance of Commission's gas price-fixing Order 19514 Appellant was the owner of subsisting gas purchase contracts prescribing, among other things, the price and measurement base for purchased gas (R. 688-744, 795-802), as well as subsisting oil and gas lease contracts providing that gas royalty shall be paid upon a basis of the market value or market price of the gas, Exhibit 54 (R. 58, 390). Commission's order increases twofold the going, current or market price of gas in the Guymon-Hugoton Gas Field (R. 183, 393, 394, 745, 417). Valid contracts are property within the meaning of the 14th Amendment, whether the operator be a private individual, a municipality, a state, or the United States; *Lynch* v. *United States,* 292 U. S. 571, 579, 78 L. Ed. 1434, 1440. The due process and equal protection clauses of the 14th Amendment are applicable to corporations; *Santa Clara County* v. *Southern Pacific Ry. Co.,* 118 U. S. 394, 397, 30 L. Ed. 118; *Minn. & S. L. Ry. Co.* v. *Beckwith,* 129

U. S. 26, 28, 32 L. Ed. 585, 586; *Leecraft* v. *The Texas Company*, 281 Fed. 918, 921, error dismissed, 262 U. S. 732, 67 L. Ed. 1205.

To justify the state in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from private persons require such interference, and second, that the means employed are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals; *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388; *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 69, 70, 81 L. Ed. 510, 518. To put it another way, the guaranty of due process demands that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. Compare *Liggett Co.* v. *Baldrige*, 278 U. S. 105, 113, 73 L. Ed. 204, 208, 209. A regulation valid for one sort of business or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts; *Nebbia* v. *New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950. It is plain from the record in this case that Commission has proceeded upon the assumption that it was authorized to increase the price of gas in the field because it believed the price being paid to certain producers and royalty owners was too cheap (R. 475-476), and that the private benefit of royalty owners and certain producers required Commission, even in the absence of legislative authority, to use its powers as a public body for their pecuniary advantage. Compare *Hood* v. *Du Mond*, 336 U. S. 525, 93 L. Ed. 865. The appli-

cation thus given to the statute under the relevant facts in the record deprives Appellant of its property for the private use and benefit of royalty owners and certain producers and is a taking of property without due process of law, forbidden by the 14th Amendment; *Chicago, St. P. M. & O. R. Co.* v. *Holmberg,* 282 U. S. 162, 167, 75 L. Ed. 270, 273. Notwithstanding the holding of the Oklahoma Supreme Court that the public interest by way of gross production tax was affected, this Court has specifically decided that when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. *Nashville C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 429, 79 L. Ed. 949, 963. Compare *Panhandle Eastern Pipe Line Co.* v. *State Highway Comm. of Kansas,* 294 U. S. 613, 79 L. Ed. 1090. In *Treigle* v. *Acme Homestead Asso.,* 297 U. S. 189, 197, 198, 80 L. Ed. 575, 580, this Court clearly pointed out:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.
>
> "As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of all members. They deprive withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain. We hold the challenged provisions impair the obligation of the Appellant's contract and arbitrarily

deprive him of vested property rights without due process of law."

This Court has many times warned that one person's property may not be taken for the benefit of another private person without justifying public purpose, even though compensation be paid. *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U. S. 55, 80, 81 L. Ed. 510, 524.

In the face of this order increasing twofold the price of natural gas in the field and considering Appellant's subsisting gas purchase contracts and oil and gas leases (R. 11-18, 688-744, 795-802), as well as the apparent purpose underlying the issuance of Commission's price-fixing order, it is difficult to perceive how Appellees can logically contend that the pecuniary injury to Appellant is so remote, contingent and speculative as to be outside the protection of the 14th Amendment; *Gange Lbr. Co.* v. *Rowley*, 326 U. S. 295, 305, 90 L. Ed. 85, 92. The impact of the order is direct; the injury to Appellant as it appears from the record is substantial and certain; the harm is immediate, and Appellant is entitled to the protection of the due process clause against the exercise of such arbitrary and capricious powers of Commission as is evidenced by the record in this case; *Nebbia* v. *New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950.

Order 19514 of the Commission commands that no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field at a price at the wellhead of less than that prescribed and on a measurement base different from that provided by the order (R. 11-18). Certainly this language plainly shows, particularly

in view of the relevant facts in the record, that the order limits and restricts the production of gas in said field for the purpose of fixing the price thereof. The Legislature of Oklahoma, 1935, by statute, 52 O. S. 1941, 204, in first ratifying the Interstate Compact to Conserve Oil and Gas, declared its policy in this language:

> "It is not the purpose of this Compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof." Art. V, Compact.

Before the expiration of the Oklahoma Legislature's ratification of the Compact, the Legislature reactivated its price-fixing declaration on three different occasions; Laws 1936 Ex. Sess., p. 49, Sec. 2; Laws 1939, Ch. 56; Laws 1941, Title 2, Ch. 3. Concededly, in Oklahoma, the Legislature is primarily the judge of the enactment. Every possible presumption is in favor of its validity and, although the Court may hold views inconsistent with the wisdom of the law, or the policy of the Legislature therein declared, it may not annul the law unless palpably in excess of legislative power. *Herrin* v. *Arnold*, 183 Okla. 392, 82 Pac. (2d) 977; *Jack Lincoln Shops* v. *State Dry Cleaners' Board*, 192 Okla. 251, 135 Pac. (2d) 332; *Appl. of Richardson*, 199 Okla. 406, 184 Pac. (2d) 642. This rule is certainly applicable to the statute, 52 O. S. 1941, 204, adopting and ratifying the Interstate Compact to Conserve Oil and Gas. Although Appellant pointed this out to the Oklahoma Court in its brief in the State Court when discussing its first proposition, as set forth verbatim in the Court's opinion (R. 899), the Oklahoma Supreme Court, in its opinion, failed to even

mention or consider the contention thus made. If the State of Oklahoma through its judiciary may accept those provisions of the Interstate Compact to Conserve Oil and Gas that it chooses and overlook or reject those that do not suit its convenience or purpose, then other states may do likewise. That this would result in confusion and a nullifying of the plain purpose of the Compact is self-evident. Without doubt such a contemplated situation led this Court to conclude that the construction of such a compact sanctioned by Congress was a federal question, the interpretation of the compact in the final analysis being a matter for this Court. *Delaware River Joint Toll Bridge Comm.* v. *Colburn,* 310 U. S. 419, 427, 84 L. Ed. 1287, 1289.

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law, except where their judgments collide with rights secured by the Federal Constitution; *Greenough* v. *Tax Assessors of Newport,* 331 U. S. 486, 497, 91 L. Ed. 1621, 1629, 1630. Since the Supreme Court of Oklahoma has confined, by its opinion, the gas price-fixing power of Commission to 52 O. S. 1941, 239, and limited Commission in its use of such price-fixing power to the prevention of waste, protection of the interest of the public and safeguarding correlative rights of producers, it would be wholly irrelevant and unnecessary for Appellant to fully analyze, discuss and consider the other immaterial findings of Commission and the evidence claimed to be in support thereof. While Commission by some of

its findings has said that Cities Service is a common carrier, a common purchaser, and a public utility (R. 17, 26), it is quite evident that such findings do not either as a matter of logic or under the decision of the Oklahoma Supreme Court afford any basis or justification for the field price-fixing order of Commission. The authority for the issuance of the order is clearly founded, according to the interpretation of the Oklahoma Court, upon 52 O. S. 1941, 239. The order as written is directed against production and not to common carriers, common purchasers, or public utilities. Appellant here points out that if it is the contention of Commission that the order is based upon the public utility statutes of Oklahoma, it was the duty of Commission to investigate and ascertain what would have been a fair and reasonable price for the producer to receive and this would require Commission to ascertain the investment cost to producer in acquiring its leases and drilling and equipping its wells to produce. This the Commission did not do. Its chairman said they were not conducting a rate hearing (R. 328). The Commission denied the demand and request of Appellant that it compel Peerless to produce the data and information from its records disclosing the investment cost of Peerless in the wells from which it had tendered gas to Cities Service for purchase (R. 338). The public utility statutes of Oklahoma are directed solely against the seller, not the purchaser. *Oklahoma Natural Gas Co.* v. *Corp. Comm. et al.*, 90 Okla. 84, 216 Pac. 917; *Oklahoma Power Co.* v. *Corp. Comm. et al.*, 96 Okla. 53, 220 Pac. 370; *Carey, Recr.* v. *Corp. Comm.*, 168 Okla. 487, 33 Pac. (2d) 788. In *Chicago, R. I. & P. Ry. Co.* v. *State*, 158 Okla. 57, 12 Pac.

(2d) 494, it was held with respect to the public utility statutes:

> "The jurisdiction of the Corporation Commission is limited to those controversies wherein the rights of a public utility and the patrons thereof are involved."

Compare *Central States Power & Light Corp.* v. *Thompson et al.*, 177 Okla. 310, 58 Pac. (2d) 868, 870.

Should it be the contention of Commission that its order is based upon the common purchaser statute 52 O. S. 1941, 240, and that under that statute it had a right to promulgate regulations for the "delivery, metering and equitable purchasing and taking of all such gas," then all that is necessary to refute this contention is to examine the plain language of the order itself, which omits all reference to common purchasers.

The record discloses that Commission's order and application of Peerless and Land Office confined the hearing in this case to the Guymon-Hugoton Gas Field (R. 38-40, 74-176, 31-35, 171-174). No evidence was offered or permitted relating to any other gas field in the State, although the record does show numerous other gas fields in Oklahoma, Exhibit 68 (R. 636A) and that Appellant is a producer and purchaser of gas therein. Commission, as well as the Oklahoma Court, apparently labors under the impression that the statute in question, 52 O. S. 1941, 239, authorizes Commission to limit its order to one common source of supply. We do not so construe the statute. If it is determined that the statute does authorize limiting the gas price-fixing order of Commission to one common source of

supply, then Appellant contends such statute, as well as the price-fixing order of Commission, as applied to Appellant, denies it the equal protection of the laws in violation of the 14th Amendment. There is no just reason, either of logic or law, which authorizes or requires Commission, if it possesses gas price-fixing power, to limit or confine its order to one gas field to the exclusion of other gas fields within the State. There is absolutely no evidence in the record to show that there are some peculiar conditions or circumstances existing in the Hugoton Gas Field with respect to price of gas that do not exist in other gas fields in the State. Nothing appears in the record to show that the waste of gas, the public interest, or the correlative rights of producers are limited and confined wholly to the Guymon-Hugoton Gas Field. What reason could be advanced to justify measuring gas in one field on a different basis than that used in another field? With this sort of logic the basis of measurement of gas or any commodity could be made different in each county. This Court long ago condemned such action as in violation of the equal protection clause. In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925, in speaking of equal protection of the laws, it is said:

> "That no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *."

Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can

never be made arbitrarily and without any such basis." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668. In *Southern R. Co.* v. *Greene*, 216 U. S. 400, 417, 54 L Ed. 536, 541, it is again said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification" (Citing cases).

Compare *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, and *Met. Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 79 L. Ed. 1070.

It is clear, from the foregoing, that the power of the Legislature to restrict the application of statutes to localities less in extent than the state, as the exigencies of the several parts of the state may require, cannot be used to deprive the citizens of one part of the state of the rights and privileges which they enjoy in common with the citizens of all other parts of the state, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, even though slight, for such classification; *Maryland Coal & Realty Co.* v. *Bureau of Mines of State*, 69 Atl. (2d) 471, 477.

It is recognized that this Court has said the question of equal protection is to be answered by practical considerations based on experience; such as, whether a classifica-

tion has relation to the purpose for which it is made rather than by theoretical inconsistencies; *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 110, 93 L. Ed. 533, 539. Courts may not declare a legislative discrimination invalid unless viewed in the light of facts made known or generally assumed, which are of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators; *Met. Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584, 79 L. Ed. 1070, 1073. The ultimate test is not whether one gas field differs from another gas field but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, price and measurement base; *Met. Casualty Ins. Co.* v. *Brownell, supra.* The selective application of a regulation to a particular class denies the equal protection of the laws if it rests on grounds wholly irrelevant to achievement of the regulation's objective; *Kotch* v. *River Port Pilot Commrs.,* 330 U. S. 552, 556, 91 L. Ed. 1093, 1097. In the absence of any showing of reasonable basis for the classification made by statute, the Court has no right to conjure up possible situations which might justify the discrimination; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266, 274, 80 L. Ed. 675, 679.

It is not difficult to understand that where Commission is promulgating well-spacing regulations, or regulations to prevent the waste of gas as a commodity, it would be proper and reasonable to limit the regulation to a single source of supply. This would be true because of the various and divergent conditions and circumstances existing in the subsurface structures and formations in the various oil and gas fields.

It cannot, however, be true with respect either to measuring the gas or fixing the price thereof. In the light of the relevant facts, what reason may be advanced and what rational basis exists for the territorial classification of measurement and price fixing in the instant case? It is not the fact that the order is merely limited to a certain locality; rather, it is the limiting of the order to a particular territorial area for the purpose of fixing a price and measurement base when there exists no conditions or circumstances in the territory selected as distinguished from the territories not affected by the order sufficient to afford any basis for such classification. Equal protection of the laws required by the 14th Amendment is not achieved through indiscriminate imposition of inequalities, and the power of the states to create and enforce property interests must be exercised within the boundaries defined by the 14th Amendment; *Shelley* v. *Kraemer*, 334 U. S. 1, 22, 92 L. Ed. 1161, 1185. It is submitted that there are no practical differences in conditions and circumstances in the Guymon-Hugoton Gas Field, appearing in this record, that would make price fixing or change of the measurement base necessary in that field to the exclusion of other gas fields in the state (R. 291). Commission has limited its hearing and investigation to the Guymon-Hugoton Gas Field (R. 38-40, 174-176, 31-35, 171-174). The discrimination of its gas price-fixing and measurement order is of such character, viewed in the light of facts shown by the record, or that can by common experience be generally assumed, that the classification made by it does not rest upon any rational basis, and by reason thereof the statute and the order as applied to Appellant violate the equal protection clause of the 14th

Amendment. The latter statement is re-emphasized by the very language of the statute, 52 O. S. 1941, 239, upon which the Court bases its decision that Commission is possessed of gas price-fixing powers by implication. The Legislature, in the last line of the statute, expressly directs Commission, in promulgating its regulations, "to prevent unreasonable discrimination in favor of any one common source of supply as against another." Where the price of gas in one field is increased and in the other gas fields of the state is left unregulated, the result is conducive to discrimination. It would be possible, as condemned by the Oklahoma Court in this case, to take more gas in one place on a low cost than in another place on a higher cost (R. 909-910). It is therefore apparent that the price-fixing order of Commission in question promotes rather than prevents discrimination.

III.

Is Order 19514 of the Oklahoma Corporation Commission, as written, carrying severe penalties for violation thereof, so vague, indefinite and uncertain, the findings of fact and law so intermingled, and the Order subject to so many varying and contradictory interpretations that a producer or purchaser from a producer cannot in advance of production or purchase, with clarity and particularity, determine his rights, duties and obligations thereunder as due process requires?

Order 19514, as decided by the Supreme Court of Oklahoma, is based upon 52 O. S. 1941, 239, a section of the 1915 Gas Conservation Act (R. 895, 910). 52 O. S. 1941, 241,

another section of the same Gas Conservation Act, provides that Commission, in the exercise and enforcement of its jurisdiction, is authorized, for violation of its orders, to punish as for contempt as in proceedings under its control over public service corporations as now provided by law. Art. 9, Sec. 19, of the Oklahoma Constitution, relating to public service corporations, makes Commission a court and provides that for failing or refusing to obey any order of the Commission the offender may be fined by the Commission such sum, not exceeding $500.00, as the Commission may deem proper, or such sum in excess of $500.00, as may be prescribed or authorized by law; that each day's continuance of such failure or refusal shall be a separate offense. 52 O. S. 1941, 247, another section of the same Gas Conservation Act, provides that in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, *directly or indirectly* violating the provisions of this Act (italics supplied) (which includes 52 O. S. 1941, 239) shall be guilty of a misdemeanor and upon conviction thereof, in a court of competent jurisdiction, shall be punished by fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment. The Supreme Court of Oklahoma in its opinion in this case (R. 896, 905), plainly indicates that unless a party taking gas from the field pays the established field price fixed by its order for the gas so taken, that Commission may shut in the taker's wells.

From the foregoing it is very apparent that one who fails or refuses to obey and comply with Commission's gas

price-fixing Order 19514 is subject to severe penalties. Appellant, in its Sixth Assignment of Error to the Oklahoma Supreme Court (R. 900) contended that this order of the Commission was void because of vagueness, indefiniteness and uncertainty. Heretofore, in this brief, Appellant pointed out the decision of this Court holding that statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligations, rather than that such measure should be dependent upon the discretion of administrative officers, to the end that ours may continue to be a government of written laws rather than one of official grace; *United States* v. *Northern Pac. Ry. Co.,* 242 U. S. 190, 195, 61 L. Ed. 240, 243. In its opinion the Supreme Court of Oklahoma recognized that the order here under consideration is legislative in character and stated it is "subject in a large measure to the rules and principles by which the validity of statutes are determined" (R. 916). This is in line with the Court's previous pronouncements. In *Associated Industries* v. *Industrial Welfare Comm.,* 185 Okla. 177, 90 Pac. (2d) 899, 914, the Oklahoma Court had occasion to consider an indefinite, uncertain and vague order. In the 13th syllabus, the Court said:

> "An administrative order legislative in character or a portion thereof, is void for uncertainty if it is so vague and indefinite that the courts are unable to determine with any degree of certainty what was intended thereby."

An examination of the Oklahoma Court's opinion in this case discloses that although Appellant contended the order was void for vagueness, indefiniteness and uncertainty,

that Court neglected to clarify the meaning of the order (R. 895-917). Appellant, in its Petition for Rehearing in the State Court, again pointed out to the Court the vagueness, indefiniteness and uncertainty of this order (R. 931-932). It called the attention of the Court to the fact that said Order 19514 was subject to many varying and contradictory interpretations, and in the following language pointed out:

"That Order No. 19514 under the opinion and decision of this Court as rendered herein is subject to the interpretation that no natural gas shall be produced in the Guymon-Hugoton Gas Field by a producer unless such producer receives for the gas he may sell within the State of Oklahoma, whether the sale of such gas be made for delivery at the wellhead, at the pipe line of purchaser or elsewhere within the state, a price at the wellhead of not less than 7 cents per mcf measured at a pressure of 14.65 lb. absolute pressure per square inch, and that producers who were and are producing and gathering gas in said field and delivering same after production and gathering for sale under subsisting gas purchase contracts, at the pipe line of Cities or other purchasers of gas in the field, must either be paid for such gas a price at the wellhead of not less than 7 cents per mcf and upon the pressure base fixed by Commission's order or Commission can shut in said producers' wells and thereby interrupt and stop the flow of gas under said subsisting gas purchase contracts.

"That said opinion and decision of this court is subject to the further interpretation that said order means that if a producer of gas in said field does not elect to sell his produced gas in Oklahoma he may, if he pays the production tax and his royalty owners on the basis fixed by the Commission's order, transport such gas so produced outside the state and there sell or dispose of

it at such price as such producer may determine, without further obligation under Commission's said order.

"On the other hand, said opinion and decision is subject to the interpretation that said order means that even if a producer does not sell his gas in Oklahoma but transports such gas so produced outside the state and there under subsisting contracts or new contracts sells or disposes of it, such producer must realize and receive from such sale or disposal at the wellhead of the produced gas a price of not less than 7 cents per MCF measured upon the pressure base fixed by Commission's said order.

"Said opinion and decision is also subject to the interpretation that Order No. 19514 is only applicable to sales of gas made by a producer to a purchaser at the wellhead in said field and that it does not apply to the sales of gas where producer produces and gathers the gas and, after such production and gathering, sells and delivers such gas to the purchaser at the pipe line of purchaser in said field or elsewhere within the State of Oklahoma outside said field" (R. 931-932).

The Oklahoma Supreme Court again declined to clarify the meaning of said order and the petition for rehearing was denied without opinion (R. 944). It is recognized that if the Oklahoma Supreme Court had in its opinion construed this order so as to remove the vagueness, indefiniteness and uncertainty thereof, this Court might say Appellant's contentions in this respect are not now available to it; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139, 68 L. Ed. 593, 596. Such is not the case here. The Oklahoma Court, although having had ample opportunity to remove the uncertainty, failed to do so, and we submit, using the language of this Court:

> "A statute (or order) which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" (Insert supplied). *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329.

In *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083, this Court said:

> "In the light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. *It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all*" (Italics supplied) (Citing cases).

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 71 L. Ed. 1145, 1155, this Court pointed out that the principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation (Citing cases). While it is recognized that this Court has recently determined that the standards for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement, *Winters* v. *New York*, 333 U. S. 507, 515, 92 L. Ed. 840, 849, it should not be here overlooked that the penalties that may be inflicted upon Appellant for a violation of the order are severe and heavy. It is entirely possible that the heavy fine or jail sentence, or both, provided by 52 O. S. 1941, 247, could be applied to Appellant. The statute says

"directly or indirectly" and, therefore, a violation of the order may be an indirect violation of the statute.

Must Appellant be required to guess at the meaning of the Commission's order, and the extent to which it may be applied, under dire penalties for failure to correctly comprehend the meaning, extent and operation of the order? What does the Commission mean by the word "take"? Does it mean produce, purchase, or does it include both activities? Must Appellant, in order to obtain gas by purchase, pay its vendors 7¢ per mcf on the prescribed pressure base plus a gathering charge, instead of the contract price of 4½¢ per mcf for gathered gas on a different pressure base or is it required only to pay its vendors for royalty gas on the basis of the order? With respect to Appellant's produced gas that it utilizes in the drilling of wells and as fuel for its field compressors or that it utilizes for other lawful purposes, if the order applies to such gas how will the Appellant comply with the order? Must Appellant sell all of its gas instead of utilizing a portion of it?

In the *Phillips Petroleum Company* case, Order No. 19702 (R. 853-857), the Commission recognized the indefiniteness and uncertainty of its order and as an afterthought it endeavored to attach a meaning thereto that was not reflected in its original findings. (Finding 4) (R. 854-855). The decision of the Oklahoma Supreme Court still leaves the meaning, extent and operation of the order completely in doubt.

Appellant produces gas from 123 wells in the Guymon-Hugoton Field (R. 397). It purchases gas under contract from producers owning many more wells in the field. All

of this gas is commingled, transported through and out of the State of Oklahoma and sold.

As to its produced gas, if Appellant is the *taker* under the order, it does not know how to *take* at a price at the wellhead of 7¢ per mcf. As to the gas Appellant purchases for 4½¢ per mcf at its pipe line in the field, Appellant does *take* the gas after it has been produced by others and transported to its pipe lines, but Appellant does not know whether it *takes* gas from the producing structures as contemplated by the order.

If, as indicated by the Phillips order, *supra*, and at least suggested by the decision of the Oklahoma Supreme Court, Order No. 19514 is applicable both to purchasers and producers, then Appellant is supplied with no standard to determine how it could be sure it paid a price sufficient to render 7¢ to its vendors when the gas is related to the wellhead. Fair compensation to Appellant's vendors for gathering the gas could involve a varying charge depending upon the current investment in facilities, the proper period of amortization and other factors. Also there would be involved the question of fair return, the use of original cost or reproduction cost, the determination of proper depreciation and other factors concerning which the order is completely silent.

Appellant is at a loss to understand how under the order it can protect its markets with adequate reserves and a continuous and uninterrupted supply of gas over a long period of years with any degree of assurance as to the extent of the rights it has acquired under its contracts.

Appellant cannot foresee the obligations of the order with enough certainty to definitely plan the financing of its operations and the expansion of its facilities.

To be sure the order applies to Appellant as a producer, or purchaser, or both, and Appellant has been deprived of substantial property rights with respect to the disposal of its produced gas and in the purchase of gas produced by others. *Buchanan* v. *Warley*, 245 U. S. 60, 62 L. Ed. 149; *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 71 L. Ed. 718. But to determine the exact extent and manner of such deprivation and substantial alteration of its property rights under the order is an utter impossibility.

Appellant submits that to require it in view of its extensive operations and investment and its duty to the public to maintain a constant uninterruptible supply of gas to its markets, to guess at the meaning, extent, effect and coverage of Commission's order denies Appellant due process of law. *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393, 70 L. Ed. 322, 329. To require any producer or purchaser to be dependent in the conduct of its business upon the discretion of subordinate administrative officers and boards abolishes the well established rule of this Court that our government shall be one of written laws rather than one of official grace; *United States* v. *Northern Pacific Ry. Co.*, 242 U. S. 190, 195, 61 L. Ed. 240, 243. Appellant feels confident this Court will not require it to conduct its business and operations upon a basis that would require it to be dependent upon an order so vague, indefinite and uncertain. Particularly so when it

is subjected to such severe penalties for guessing wrong as to the meaning, extent and coverage of the order.

IV.

Does 52 O. S. 1941, 233, contain a sufficient standard within the meaning of the provisions of the 14th Amendment to guide the Oklahoma Corporation Commission in fixing a price higher than the market, current or going price and other terms for the taking and purchasing of natural gas different from those prevailing in the field at the time and place of the tender, taking or purchase where the parties thereto cannot agree upon the terms thereof?

If the Oklahoma Corporation Commission is lawfully empowered by 52 O. S. 1941, 233, for the purpose of settling a dispute between a producer and a taker or purchaser of gas, to fix the price or terms thereof, does the undisputed and indisputable evidence in the record as applied to the operations of Appellant as a purchaser and taker of natural gas in Oklahoma prove facts legally sufficient within the meaning of the provisions of the 14th Amendment to authorize said Commission under said statute to issue its Order 19515, make the findings it did in support thereof, and apply retroactively to Appellant by said order, in settling said dispute, the price and measurement base fixed by its legislative Order 19514, when such applied price was twofold the price being currently paid by Appellant under subsisting gas purchase contracts with other sellers in the Guymon-Hugoton Field made as authorized by 52 O. S. 1941, 233?

These two propositions relate to Commission's judicial Order 19515 and the statute (52 O. S. 1941, 233) upon which said order was based and will be discussed together. At

e outset, Appellant desires to point out to this Court that
d Commission, under 52 O. S. 1941, 233, ascertained the
ing, current or market price and other terms for taking
d purchasing natural gas existing in the field, Appellant
ould not be here complaining of Commission's Order
515. In this connection we desire to call again the atten-
on of this Court to the application of Peerless (R. 33)
d the answer of Cities Service (R. 48). An examination
these pleadings will show the indisputable fact ad-
itted by Peerless that Cities Service was during all times
aterial herein agreeable to taking, by purchase, the gas
om the Peerless wells at the going, current or market
ice then existing in the field in conformity with subsist-
g Order 17867 (R. 33, 48, 543) of the Commission and
isting laws of Oklahoma. The first question then pre-
nted is whether 52 O. S. 1941, 233, contains a sufficient
andard within the meaning of the provisions of the 14th
nendment to guide said Commission when acting under
id statute to fix a price higher than the going or market
ice and other terms for the taking and purchasing of
tural gas different from those prevailing in the field at
e time and place Peerless tendered its gas to Cities Serv-
e for purchase. The language of the statute reads, "* * *
case they cannot agree at such a price and upon such
rms as may be fixed by the Corporation Commission after
tice and hearing." In the very recent case of *Saia* v.
ew York, 334 U. S. 558, 560, 92 L. Ed. 1574, 1577, this
ourt, in considering a city ordinance having the force
a statute which forbade the use of sound amplification
vices except with the permission of the Chief of Police,
id, "there are no standards prescribed for the exercise

of his discretion." This Court struck down the ordinance as unconstitutional. We submit that the statute here under examination grants Commission, where the parties to the taking or purchasing of gas cannot agree, the right to fix such a price and such terms for the taking and purchasing as the Commission in the exercise of its uncontrolled discretion may deem proper. The case at bar falls clearly within the ruling of this Court in *Saia* v. *New York, supra*. To constitute a proper standard within the meaning of the due process clause, the power to be exercised must be canalized so that the exercise of the delegated power will be restrained by banks in a definitely defined or at least a reasonably ascertainable channel. As pointed out heretofore in this brief, the test is whether the statute is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. *Champlin Refining Co.* v. *Corp. Comm.*, 286 U. S. 210, 243, 76 L. Ed. 1063, 1083; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463, 71 L. Ed. 1146, 1155; *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239, 69 L. Ed. 589, 593. Is it possible for Appellant or any reasonably intelligent and prudent person to read this statute and be able therefrom to ascertain the extent of Commission's authority? As shown by the reasoning of this Court in *Fahey* v. *Mallonee*, 332 U. S. 245, 251, 91 L. Ed. 2030, 2037, the purpose of the plain language of the statute is clearly disclosed to authorize any price or terms of purchase and taking Commission would propose or prescribe as wise and beneficent in settling the claimed dispute. Apparent it is that the statute contains no intelligible or adequate standard to guide Commission in the exercise of any price-fixing authority. *Panama Rfg.*

Co. v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446; *A. L. A. Schechter Poultry Corp.* v. *United States,* 294 U. S. 495, 79 L. Ed. 1570. It is therefore void because it confers upon Commission arbitrary, capricious and unreasonable gas price-fixing powers in violation of the due process clause of the 14th Amendment; *Nebbia* v. *New York,* 291 U. S. 502, 525, 539, 78 L. Ed. 940, 947.

Should this Court, upon some principle of logic or law with which this Appellant is not familiar, find the statute in question does contain an adequate standard, then Appellant contends that the undisputed and indisputable evidence in the record, as applied to Appellant as a purchaser and taker of natural gas in the field, is not legally sufficient under the 14th Amendment to justify Commission's Order 19515. In this connection we reiterate it is indisputable that at the time Peerless tendered gas from its wells to Cities Service for purchase there existed in said field subsisting basic Order 17867 of Commission (R. 535-549). This order as construed by the Supreme Court of Oklahoma, *Application of Moran,* 201 Okla. 43, 200 Pac. (2d) 758, required Peerless, in order to have its acreage considered or held to be producing acreage, to tender, in good faith, the gas from its wells to Cities Service at the going price in the field (R. 543). It cannot be denied that at said time there was in full force and effect Revised Maximum Price Regulation 436 (R. 748-790) promulgated under authority of the Federal Emergency Maximum Price Control Act of 1942, as amended, 50 U. S. C. A. 901, *et seq.,* making it unlawful for Peerless to tender its gas to Cities Service for purchase at a price in excess of 4¢ per mcf (R. 745-747). If Cities Service had accepted said gas so tendered to it

by Peerless at the 6¢ price, shown by the Peerless written tenders (R. 35-38), both Peerless and Cities Service would have been subject to federal prosecution for a violation of the Emergency Price Control Act and Revised Maximum Price Regulation 436 (R. 748-790), 50 U. S. C. A. 904.

An examination of the plain language of Order 19515 will show that Commission has copied verbatim the provisions of its legislative field price-fixing Order 19514 into Order 19515.

It cannot be denied, and the Supreme Court of Oklahoma has decided, that Order 19515 is based solely on 52 O. S. 1941, 233 (R. 895). It must be conceded that subsisting regulations of Commission, Order 17867 (R. 535-549), required at the time Peerless tendered its gas to Cities Service that it do so at the going price in the field (R. 543). It cannot be disputed that Order 19515 is judicial in character because the authority for the order as decided by the Oklahoma Supreme Court is based upon past facts and under a statute and regulations in existence at the time of the tender of gas. In *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, this Court pointed out the fundamental distinction between judicial and legislative inquiries when it said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

What the Commission did in this case was well recognized by the Supreme Court of Oklahoma when it said with respect to Order 19515:

> "The portion of the order directing payment for the gas so taken at not less than seven cents per thousand cubic feet at the wellhead rests upon the Commission's general order (19514) prohibiting the taking of gas from the producing structures or formations in the field for a price at the wellhead of less than seven cents per thousand cubic feet" (Insert supplied) (R. 905).

It is thus apparent that what Commission has done is to promulgate its legislative gas price-fixing order and apply it retroactively to Appellant by its judicial order.

That this cannot be done to the detriment of vested property rights and existing defenses accruing before the promulgation of the order is well settled. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 198, 80 L. Ed. 575, 581; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; *Fidelity and Deposit Co. of Maryland* v. *Arenz*, 290 U. S. 66, 68, 78 L. Ed. 176, 178.

This is particularly true where the statute does not expressly authorize the making of retroactive orders. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, 163, 72 L. Ed. 509, 511, 512. The principle is strictly applicable to statutes which have the effect of creating an obligation. An administrative regulation is subject to the rule equally with a statute and, accordingly, the legislative field price-fixing order of Commission cannot be applied retroactively. *Miller* v. *United States*, 294 U. S. 435, 439, 79 L. Ed. 977, 981.

To permit Commission to do so would divest Appellant of its defense of unlawful tender acquired under subsisting Order 17867 (R. 535-549). *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107; compare *Coombs* v. *Getz*, 285 U. S. 434, 441, 76 L. Ed. 866, 871. This Court has said:

> "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apts. Co.* v. *Commr. of Internal Revenue*, 323 U. S. 141, 164, 89 L. Ed. 139, 153.

The Legislature of Oklahoma, in the instant case, has not authorized the making of retroactive orders by Commission.

Attention is directed to that part of 52 O. S. 1941, 233, which limits the authority of the Commission to fix price and terms only in case the parties to the taking and purchase cannot agree. The undisputed evidence in this case shows that Cities Service is purchasing gas, pipe line delivered in the field, under three separate subsisting contracts (R. 668-712, 713-744, 795-802) at a price of 4½¢ per mcf delivered to its pipe line system in the field, the ½¢ being for gathering, transporting and delivering (R. 396). Paragraph 9 of Commission's subsisting basic Order 17867 requires that all purchasers, takers and producers of gas in the pool comply with the common purchaser and ratable taking provisions of the Oklahoma Statute by the equitable purchasing, producing and taking of all gas without discrimination in favor of one producer as against another (R. 548). The common purchaser statute, 52 O. S. 1941, 240, absolutely prohibits a purchaser from discriminating in favor of or against those producers from whom it purchases. If the legislative field order of Com-

mission (19514) means that it is only applicable to producers, then Order 19515, which is directed only against Cities Service, discriminates in favor of Peerless because Cities Service, having entered into its subsisting gas purchase agreements with other producers in the field as authorized by 52 O. S. 1941, 233, at a price of 4½¢ per mcf, pipe line delivered, is required to pay Peerless under the order 7¢ per mcf and measure the gas upon a different pressure base which increases the price to practically 8¢ per mcf. Order 19515 is a judicial directive solely against Cities Service for the pecuniary benefit and advantage of Peerless alone and discriminates in its favor and against Appellant and other producers in the field.

While Commission in its findings in support of Order 19515 found that Cities Service is a common carrier, a common purchaser, and a public utility (R. 26), the findings are immaterial because Cities Service has during all times material herein been ready and willing to take by purchase the gas of Peerless (R. 48). In addition, the Oklahoma Supreme Court by its interpretation of the statute, has made such findings irrelevant because of its decision in *Republic Natural Gas Co.* v. *Oklahoma*, 198 Okla. 350, 180 Pac. (2d) 1009, wherein it construes 52 O. S. 1941, 233, to apply to any producer who is taking gas from the field regardless of whether such producer is a common carrier, common purchaser, or a public utility.

The Supreme Court of Oklahoma in its decision in the case at bar has laid much stress upon the dissenting opinion of certain justices of this Court in the case of *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 6[illegible] 99, 92 L. Ed. 1212, 1236. Appellant here makes no contentions against

the views expressed in the dissenting opinion. In the *Republic* case, Appellant does want to point out that the issue there related to the taking of the gas as gas and was not concerned with the price or proceeds thereof. Republic refused to take the gas under any circumstances. In the case at bar Cities Service has offered to take the Peerless gas and is taking the Peerless gas under the stipulation (R. 48, 211, 589-590) so there can be no question of drainage. The only issue is price and change of measurement base. In the dissenting opinion of MR. JUSTICE RUTLEDGE, concurred in by three other members of this Honorable Court, in speaking of the terms and provisions of the statute, 52 O. S. 1941, 233, it is said:

> "This assumes that if the parties should be unable to agree upon terms, the Commission will fix them in a manner *taking due account of prevailing market conditions relevant to the price to be paid,* as well as reasonable compensation for the use of Republic's facilities. *With those limitations properly applied,* it is hard to see what great business risk will be shifted to Republic" (Italics supplied).

It is clear that the minority opinion of this Court in the *Republic* case anticipated that Commission in fixing the price would give due consideration to prevailing market conditions relevant to the price Republic would have to pay. In the case now before this Court the record is plain that Commission, instead of ascertaining the going, current or market price existing in the field, totally disregarded it and arbitrarily increased the price twofold and commanded that Cities Service pay to Peerless that amount. The dissenting opinion in the *Republic* case is in line with the

dissenting opinion of MR. JUSTICE HALLEY in the case at bar, as he said (R. 593):

> "The price fixed by the Commission where seller and buyer are unable to agree upon a price, should be the current market price prevailing in the field. Any other price would be unfair, discriminatory and inequitable."

The foregoing discloses the arbitrary and unreasonable action taken in this case and is further proof of the fact that the order here under consideration, as well as the statute upon which it is based as applied to Appellant, is a nullity and should be set aside and declared invalid.

V.

Was Appellant granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before the Oklahoma Corporation Commission leading to the issuance of Order 19515?

Before undertaking a discussion of this proposition it is essential at the outset to acquire a clear picture of the character of each of the orders of the Commission under consideration in this appeal. For many years this Court's decision in the case of *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. Ed. 150, 158, clearly pointing out the distinction between a judicial and legislative inquiry, has been recognized and followed by the various state courts. Oklahoma has been no exception. *Associated Industries* v. *Industrial Welfare Comm.*, 185 Okla. 177, 90 Pac. (2d) 899. This Court, in *Prentis* v. *Atlantic Coastline Co., supra*, page 226, declares:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

It cannot be gainsaid that Order 19514 looks to the future and changes existing conditions in the Guymon-Hugoton Gas Field with respect to price and measurement base by making a new rule with respect thereto to be applied thereafter to all producers and perhaps purchasers of gas in the Guymon-Hugoton Field. Neither can it logically be denied that Order 19515 is directed solely against Appellant because it clearly declares and enforces a liability against Appellant in favor of Peerless on past facts and under a specific statute, 52 O. S. 1941, 233, and a particular regulation, Order 17867 (R. 535-549), both in existence at the time of the accrual of the facts and the issuance of the questioned order. The Oklahoma Court, in the case of *H. F. Wilcox Oil & Gas Co.* v. *State*, 152 Okla. 89, 19 Pac. (2d) 347, had occasion to and did clearly disclose the distinction between legislative and judicial orders as applied to Commission and its powers when promulgating and enforcing its regulations for the prevention of waste. On page 350 of the Pacific citation, that Court said:

"*In making such rules it acts in a legislative capacity.* When making such rules it may ascertain in any manner it sees fit what rules should be made and it may make such rules without the hearing of any evidence or without regard to the evidence heard. *When it attempts to apply those rules in order to pre-*

vent waste or to regulate production, it acts in a capacity at least quasi judicial. When so acting it must act either under the rules of procedure and evidence provided by the legislature, or under rules of procedure and evidence provided by itself, and it may not then act without evidence or upon incompetent, irrelevant and immaterial evidence" (Italics supplied).

Compare *Skelly Oil Co.* v. *Corp. Comm.*, 183 Okla. 364, 82 Pac. (2d) 1009, 1010. In Oklahoma the Corporation Commission has been granted powers withheld from ordinary administrative agencies which enable it to so function as a legislative as well as a judicial and executive body. *Patterson* v. *Stanolind Oil and Gas Co.*, 182 Okla. 155, 77 Pac. (2d) 83, 92. The Corporation Commission of Oklahoma, in the exercise of its function as a legislative, judicial and executive body, has promulgated general rules and regulations, among other things governing the various procedures before it, Exhibit 70 (R. 672-685). Article II of the Procedural Rules (R. 675) covers the procedure of the Commission in promulgating rules and regulations governing the conservation of oil and gas. Article IV of said Procedural Rules (R. 680) prescribes the rules of practice and procedure to be followed in making orders, enforcing laws relating to equitable and ratable taking of oil and gas, and promulgation of orders of Commission with respect thereto. Section 3 of Article IX of said Rules (R. 687) provides:

"In proceedings and hearings before the Commission relating to the conservation of oil and gas and the equitable and ratable taking thereof, *the Commission shall be governed by the code of civil procedure of the State of Oklahoma in all matters not covered by law*

relating to the conservation of oil and gas or by the rules of practice and procedure herein prescribed" (Italics supplied).

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433, this Court had occasion long ago in speaking of procedural due process before an administrative tribunal exercising *quasi* judicial powers to say:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi judicial* in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence" (Citing cases).

This ruling of the Court has been reiterated; *Southern Railway Co.* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 195, 78 L. Ed. 260, 264. In *Kessler* v. *Strecker*, 307 U. S. 22, 34, 83 L. Ed. 1080, 1090, this Court said:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the department must stand and cannot be corrected in judicial proceedings. *If, on the other hand, one of the elements mentioned was lacking, the proceeding is void and must be set aside*" (Italics supplied).

Compare *Bridges* v. *Nixon*, 326 U. S. 135, 154, 89 L. Ed. 2103, 2115. The Oklahoma Supreme Court has consistently recognized these principles of procedural due process except in the instant case. In *Skinner* v. *State*, 189 Okla. 235, 115 Pac. (2d) 123, it said, on page 126 of the Pacific citation:

> "Due process has a dual significance as it pertains to procedural and substantive law. As to procedure it means notice and an opportunity to be heard and to defend *in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause*" (Italics supplied). See *Skinner* v. *State*, 316 U. S. 535, 86 L. Ed. 1655.

Compare *H. F. Wilcox Oil & Gas Co.* v. *Walker*, 169 Okla. 33, 32 Pac. (2d) 1044, 1049; *Hauschuldt* v. *Collins*, 152 Okla. 193, 4 Pac. (2d) 99.

When this Court examines the record before it Appellant believes its inescapable conclusion will be that Appellant has not been granted either a fair and impartial hearing or an orderly hearing adapted to the nature of the case before an impartial tribunal having jurisdiction of the cause. Commission refused to inform Appellant in advance of the hearing, in view of the recitations and facts set forth in its motion (R. 44-45), what rules of practice and procedure would be applied (R. 64). Commission allowed the misjoinder of judicial and legislative matters and consolidated same for hearing at the same time (R. 179, 180, 181); allowed Commissioners of the Land Office to intervene in in the proceedings (R. 168-176, 178-181, 574); conducted a plebiscite of land and royalty owners while the case was in hearing (R. 112-117) and filed petitions with Federal Power Commission while the trial was in progress stating Commission was interested in increasing the price of natural gas in the Guymon-Hugoton Field (R. 475-476). Commission's Conservation Attorney, as well as the Attorney for the Commissioners of the Land Office, was permitted

to take an active part in the hearing of a private dispute between Peerless and Cities Service (R. 182, 332-333). Commission admitted incompetent, irrelevant and hearsay evidence and testimony (R. 161, 163-164, 118-119, 282-283), and refused to segregate and separate the testimony so Cities Service could know what evidence pertained to the judicial phase of the case and what evidence pertained to the legislative phase of the case (R. 339). It refused to recognize, apply and abide by its own subsisting orders (R. 543, 548). In view of all these things, is this Court able to say that Appellant has been granted procedural due process in accordance with the provisions of the 14th Amendment at the hearing before Commission leading to the issuance of Order 19515? We submit it is academic and settled law:

> "An administrative hearing in the exercise of judicial or *quasi judicial* power must be fair, open, and impartial. The right to such hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void." 42 Am. Jur., Sec. 137, pages 479, 480.

See, also, *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 30[illegible], 305, 81 L. Ed. 1093, 1102; *Morgan* v. *United States*, 304 U. S. 1, 15, 82 L. Ed. 1129, and cases there cited.

If ours is to be a government of law and not of men, deference for the basic principles underlying procedural due process necessitates that this Court, upon the record of this case, set aside as unconstitutional and unlawful the judicial directive of Commission in this bifurcated and unprecedented proceeding.

VI.

Do Orders 19514 and 19515 and the respective statutes, 52 O. S. 1941, 239, and 52 O. S. 1941, 233, upon which said orders were based, as interpreted and applied to operations of Appellant under the undisputed and indisputable evidence in the record, cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant?

If considered separately it seems clear that Orders 19514 and 19515 affect interstate commerce in the same manner. So considered, the difference in their effect is only a matter of degree. However, since Order 19514 is all inclusive with respect to natural gas taken from the producing structures of the Guymon-Hugoton Field and, further, since Order 19515 obviously could not stand if Order 19514 is invalid, no good purpose would be served in considering the two orders separately under this section of the brief. Therefore, Appellant's argument here will be directed against the field-wide order, No. 19514.

The undisputed evidence in the record shows that approximately 90% of all gas produced and transported out of the Guymon-Hugoton Field by the various companies operating therein goes into interstate commerce

(R. 386-387). Virtually all of the gas Appellant produces and purchases goes into interstate commerce (R. 389-390). No processing or packing is involved nor is there any hesitation in the movement of gas from the time it leaves the producing structures and formations. It flows continuously and without interruption to the markets in the several states (R. 401, 462). It is thus clear that the burden cast upon interstate commerce is immediate and substantial. It could not under the circumstances be considered incidental.

The record in this case forcibly illustrates that no waste of gas as defined or contemplated by the Oklahoma Statutes was being committed nor was it threatened or imminent in the Guymon-Hugoton Field (R. 63-321). Correlative rights of producers, landowners and royalty owners in or to gas as such were and are being protected. Conservation of natural gas was and is being had in said field in accordance with existing Oklahoma Statutes and subsisting orders of said Commission (R. 63-321). It is thus clear, in the light of the undisputed evidence in the record, that the practical effect of the order is to prohibit gas from being the subject of interstate commerce unless local economic interests are aided by doubling the going or market price. It is precisely this practice which this Court has forbidden in *Hood v. Du Mond*, 336 U. S. 525, 530, 531, 93 L. Ed. 865, 870. There the Court said:

> "It is only additional restrictions imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests that are in question here * * *."

This Court flatly stated that such action by a state would neutralize the economic consequences of free trade among the states and set a barrier to traffic between the states as effectively as if customs duties equal to the price differential had been laid upon the thing transported. Repeated emphasis is laid upon the principle that a state may not promote its own economic advantages by curtailment or burdening of interstate commerce.

The only distinction, if any, between the case at bar and *Hood* v. *Du Mond, supra,* is that the "avowed" purpose of the price-fixing order of the Oklahoma Corporation Commission is the prevention of waste. Its "practical effect" is the curtailing of the volume of interstate commerce to aid local economic interests. Appellant has heretofore shown that no waste as contemplated by the Oklahoma Statutes was being committed or was threatened or imminent. It therefore follows that the ostensible purpose of the Corporation Commission of Oklahoma is a guise with which said Commission seeks to do that which is forbidden under the Constitution. Otherwise stated, the Commission, by said order, attempts to bestow upon itself unilaterally the mask of valid exercise of the police power, namely, the conservation of a natural resource. In truth and in fact, however, the sole and only purpose of the order, as revealed by the undisputed evidence, was to gain economic benefits for a small group of producers and royalty owners in the form of increased price simply because the Corporation Commission thought the price of gas was "too low."

This Court has never hesitated to inquire into such action by the state which attempts by construction to circumvent the provisions of the Federal Constitution. In *Minnesota* v. *Barber*, 136 U. S. 455, 34 L. Ed. 313, the State of Minnesota had enacted, purportedly as a health measure, an inspection provision requiring that all meat sold in that state must be inspected and approved by state authorities within twenty-four hours after slaughtering. This Court held that although such statutory requirement purported to be a valid exercise of the police power of the state in protecting the health of its citizens, it was, nevertheless, only a guise for the prevention of importation of beef from Illinois. If this Court were not free to examine into the true purpose of state action the states could in almost any instance they chose circumvent the provisions of the Federal Constitution merely by a self-serving declaration of a valid exercise of state power.

In the case of *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255, 55 L. Ed. 716, 726, this Court said:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which

would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

In the case at bar the nature and effect of the interference with interstate commerce by the State of Oklahoma is similar to that which would have resulted from the conservation measure attempted by Oklahoma in the case of *West* v. *Kansas Natural Gas Company, supra.* There the avowed conservation measure would have prohibited natural gas from being the subject of interstate commerce, for the purpose of bestowing benefits upon the inhabitants of the state. Here, under the guise of the

prevention of waste of natural gas, the State of Oklahoma seeks, not necessarily to bar, but to heavily burden interstate commerce, for the purpose of bestowing pecuniary benefits upon a very small and selected segment of its population.

The Oklahoma Supreme Court in its opinion labors under the impression that because it has said the minimum gas price field order regulation is imposed before any operations of interstate commerce occurred that the order does not concern interstate commerce. It cites and relies upon *Parker* v. *Brown,* 317 U. S. 341, 87 L. Ed. 315. Under *West* v. *Kansas Natural Gas Co.* and *Hood* v. *Du Mond, s .pra,* this would make no difference even if true. The Oklahoma Court then quotes the following from the Parker case:

> "No case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer *after processing and packing* them, will in the normal course of business, sell and ship them in interstate commerce." (Italics supplied).

The Court in the *Parker* case made it clear that processing and packing was the answer to the contention that interstate commerce had been unduly burdened. This is not true in the case at bar. As stated in *United Fuel Gas Co.* v. *Hallahan,* 257 U. S. 277, 281, 66 L. Ed. 234, 239:

> "There is no break, no period of deliberation, but a steady flow, ending as contemplated from the beginning, beyond the state line."

Whatever other meaning the Corporation Commission order may have, it is clear that the Commission has said:

> "No natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price at the wellhead of less than 7 cents per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch."

Thus, it is obvious that the Corporation Commission has, in effect, stated that interstate commerce may not be accomplished except on a condition imposed by the State of Oklahoma, to-wit, the payment of the stated price. There is no difference in principle between the case at bar and the situation considered in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 596, 597, 67 L. Ed. 1117, 1132. In that case West Virginia attempted, by state legislation, to forbid the export of natural gas from West Virginia until local needs had been satisfied. This Court, in striking down the statute, said:

> "Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce—a prohibited interference. (Citing many cases). The West Virginia Act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now

going to consumers in the complainant states and therefore will work a serious interference with that commerce."

If Oklahoma can increase the price of gas going into interstate commerce, in order to give an economic advantage and benefit to certain of its royalty owners and selected producers, obviously other states may do likewise with respect to their own products and commodities. The chaotic result is apparent—the harm to the nation immediate and clear. See *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 13, 73 L. Ed. 147, 154. The net result of this course of action is that other states would seek methods of retaliation and the final effect would be the "Balkanization" of commerce among the states. It was to prevent this very result that the interstate commerce clause was included in the Federal Constitution.

A somewhat comparable situation to that in the present case was considered by this Court in *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752. In that case the State of Pennsylvania had enacted a law including provisions to protect producers, much like the questioned order of the Commission here involved, particularly with respect to price. One significant distinction, however, was that the statute was passed by the Legislature in the exercise of its police powers and was not, as here, a result of judicial legislation. In the *Eisenberg* case a concern which operated a receiving plant in Pennsylvania from which it shipped milk to the New York City market challenged the act on the grounds, among others, that if construed to require it to pay producers

the price prescribed by the state board, it unconstitutionally regulated and burdened interstate commerce. This Court held, in substance, that since only a small fraction of the milk produced in Pennsylvania was shipped out of the state and since there remained a large field remotely affected and wholly unrelated to interstate commerce, within which the statute did operate, the effect of the statute on interstate commerce was incidental. This Court clearly indicated, however, that the result would have been different in the *Eisenberg* case had the facts indicated a substantial burden on interstate commerce. Here that substantial burden is shown without contradiction to exist. As heretofore stated, approximately 90% of the gas produced in the Guymon-Hugoton Field, Texas County, Oklahoma, is transported out of the state for sale in other states and all of the gas produced and purchased by this Appellant, except an inconsequential amount, is so transported and sold. Compare *Baldwin* v. *Seelig, Inc.*, 294 U. S. 511, 79 L. Ed. 1032, which is the converse of this case.

Certainly Order 19514, whether it directs Appellant as a purchaser of gas to pay 7¢ per mcf on the designated pressure base or simply forbids producers of natural gas from selling their gas to Appellant at a price and on a measurement base different from that prescribed in the order, the result as it affects Appellant with respect to its purchasing of gas is the same. It increases twofold the price of such gas purchased for transportation and sale in other states and casts a substantial and undue burden on interstate commerce. The record shows without contradiction that under each of Appellant's gas purchase

contracts the gas purchased is for transportation to other states (R. 46, 47, 695, 714, 795). The gas is destined for out-of-state use even before it is delivered to Appellant under said contracts.

An identical situation was considered by this Court in *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198, 199, 69 L. Ed. 909, 914. In that case wheat was purchased within the state for out-of-state consumption, approximately ninety per cent thereof being sold within the state to buyers who purchased for shipment and shipped to terminal markets outside the state. This Court held:

> "Buying for shipment and shipping to markets in other states when conducted as before shown constitutes interstate commerce, the buying being as much a part of it as the shipping."

Gas being a commodity which Oklahoma has by its laws and regulations authorized to be produced and reduced to possession, and therefore to become property (R. 507-549), is a legitimate article of commerce; *Pennsylvania* v. *West Virginia, supra.* It is the subject of dealings that are nationwide. The right to buy it for transportation and to transport it in interstate commerce is not a privilege derived from state laws which the state may fetter with conditions. It is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 260, 55 L. Ed. 716, 728; *Best & Company, Inc.* v. *Maxwell*, 311 U. S. 454, 457, 85 L. Ed. 275, 278; *Freeman* v. *Hewitt*, 329 U. S. 249, 252, 91 L. Ed. 265, 271.

Speaking further in the *Shafer* case, this Court said, with respect to the State Act there under consideration:

> "By it that state (North Dakota) attempts to exercise a large measure of control over all wheat buying within her limits. About 90% of the buying is in interstate commerce. * * * Obviously, therefore, the control of this buying is of concern to the people of other states as well as those of North Dakota. Only by disregarding the nature of this business and neglecting important features of the act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. * * * We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause." U. S. 199, 200.

This Court struck the act down on the ground it cast an undue burden on interstate commerce. We submit the principle there applied is applicable to the facts here undisputed. Compare *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Lemke* v. *Homer Farmers' Elevator Co.*, 258 U. S. 65, 66 L. Ed. 467; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524; *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 79 L. Ed. 1032; and *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 657, 93 L. Ed. 682.

The order is confined in its operation and effect solely to one gas field. The record in this case, Exhibit 68 (R.

636A), shows numerous other gas fields in Oklahoma. Certainly it will not be disputed that there are intrastate companies purchasing gas in these other fields. The Commission having confined its hearing to one field (R. 39, 174, 176), it is not possible to show that the purchasers in these other fields are intrastate companies. The record does show, as heretofore stated, that in the Guymon-Hugoton Field approximately 90% of the gas goes into interstate commerce. In view of the restrictions placed upon the hearing leading to the promulgation of the field-wide price-fixing order in this case, it seems fair to assert that the purpose or objective of this order was and is to favor intrastate business to the detriment of interstate business; otherwise, the order would have been state-wide.

Even assuming *arguendo* that the orders of the Oklahoma Corporation Commission might have some incidental effect on the conservation of natural gas, there is no question but that they cast a real, direct, substantial and undue burden on and discriminate against interstate commerce and that the Supreme Court of Oklahoma erred in upholding the validity of said orders and the statutes under the purported authority of which they were made.

CONCLUSION

For the reasons stated and upon the grounds urged, it is respectfully submitted that the final judgment, decree and decision of the Oklahoma Supreme Court should be

reversed and declared null and void because in violation of the Federal Constitution.

Respectfully submitted,

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October, 1950.

APPENDIX

APPENDIX

APPENDIX A
(1945)

HOUSE BILL NO. 431—By HUGHES

AN ACT DEFINING WASTE OF NATURAL GAS; PROHIBITING WASTE THEREOF; CONFERRING UPON THE CORPORATION COMMISSION JURISDICTION TO FIX THE INTRINSIC VALUE OF NATURAL GAS; AUTHORIZING THE CORPORATION COMMISSION TO PROHIBIT PURCHASE AND SALE THEREOF BELOW SUCH VALUE; PRESCRIBING PROCEDURE; AND DECLARING EMERGENCY

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. In addition to the meanings of waste of natural gas as defined by the laws of the State of Oklahoma, the sale and purchase of natural gas at a price below its intrinsic value shall constitute economic waste, and same is prohibited.

SECTION 2. Jurisdiction is hereby conferred upon the Corporation Commission of Oklahoma to prohibit the sale and purchase of natural gas at a price below its intrinsic value; and said Commission is hereby authorized and directed to determine and to fix such intrinsic value in all of the wells and pools in the State of Oklahoma, and to prohibit the sale and purchase of natural gas at a price below such intrinsic value.

SECTION 3. In fixing the intrinsic value of natural gas and prohibiting the sale and purchase thereof at a price below said value, the procedural requirements of Chapter 131, Session Laws of 1933, as amended, shall apply in all cases.

SECTION 4. It being immediately necessary for the preservation of public peace, health and safety, an emergency is hereby declared to exist by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

APPENDIX B
(1947)

HOUSE BILL NO. 439—By FIELD, MUSGRAVE of the House, and LEONARD of the Senate

AN ACT TO CONSERVE NATURAL GAS IN THE STATE OF OKLAHOMA, TO PREVENT WASTE THEREOF, PROVIDING FOR THE RATEABLE AND EQUITABLE TAKING THEREOF, GOVERNING THE PRODUCTION, MARKETING, PURCHASE AND SALE THEREOF, SUPPLEMENTING LAWS NOW IN EFFECT RELATIVE THERETO, SUPPLEMENTING THE AUTHORITY OF AND CONFERRING AUTHORITY ON THE CORPORATION COMMISSION; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. The term waste, as used herein, in addition to the ordinary meanings and in addition to the other meanings provided for in the oil and gas statutes of the State of Oklahoma now in effect or enacted by this Legislature, shall include Economic Waste and Wasteful Utilization of natural gas.

SECTION 2. (a) The Legislature of the State of Oklahoma hereby declares that: The present low price of natural gas available to producers of natural gas in this State, the discrimination in the purchase and marketing of natural gas, the stifled markets of natural gas due to monopolistic control of markets of natural gas, the marketing of natural gas in excess of the reasonable and necessary market demands therefor, the inability of producers to expand existing markets or to develop new or larger markets for natural gas produced in this State tend to prevent producers of natural gas and those in the employ of such producers and owners of minerals from contributing their fair share to the support of the necessary govern-

mental and educational functions and thereby tend to increase unfairly the tax burdens on other citizens of the State, result in waste of natural gas, as such waste is defined herein, and in inequitable taking and marketing of natural gas in this State.

(b) The aforesaid conditions vitally concern the health, peace, safety and general welfare of the people of this State and result in the wasteful dissipation and wasteful utilization of natural gas one of the great and irreplaceable resources of the State. It is declared to be the policy of this State to aid producers of natural gas in preventing or correcting adverse marketing conditions, improving existing marketing conditions, expanding existing markets, developing more orderly or efficient or equitable methods of taking, producing and marketing natural gas and thereby enabling the producers of natural gas, those in the employ of such producers and mineral owners to contribute their fair share to the support of necessary governmental and educational functions of the State and preventing the waste of natural gas.

(c) The production, taking, and marketing of natural gas in this State is hereby declared to be affected with a public use and interest. The provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State and for the purpose of preventing the waste of natural gas, one of the great natural resources of this State.

SECTION 3. For the purpose of carrying out and making effective the purposes of this Act as expressed in the Legislative Declaration hereof, the Corporation Commission of this State is authorized and empowered and is directed to make and enter such orders and to make and prescribe such rules and regulations to regulate the production, taking, marketing, sale and purchase of natural gas and to fix and prescribe such a minimum price of

natural gas at the wellhead, in each common source of supply or field producing natural gas, as to prevent discrimination in the marketing, sale and purchase of natural gas, the marketing of natural gas in excess of market demand, the waste of natural gas and to promote the equitable and rateable taking of natural gas, the expansion of the existing markets for natural gas and the development of new markets for the same, in each source of supply or field producing natural gas. In fixing the price, terms and conditions of the taking and sale and purchase of natural gas the Commission shall not be limited to the utility rule of "reasonable return on investment" but may take into consideration any and all factors, which, in the discretion of the Commission, shall be conducive to the attainment of the purposes of this Act. Provided that the Commission shall take into consideration the price of natural gas at the wellhead in adjoining states producing from a common source of supply in arriving at the price to be set in Oklahoma.

SECTION 4. Any producer or taker of natural gas or any owner of mineral interests in any common source of supply or field producing natural gas in this State, may make application to the Corporation Commission for an order of said Commission or the Commission may, on its own motion and after notice, make and enter an order prescribing rules and regulations governing the production, taking, marketing, sale and purchase, including a minimum price of natural gas at the wellhead and the terms and conditions of the production, taking, marketing and purchase and sale of natural gas in each common source of supply or field producing natural gas in this State.

SECTION 5. Notice of hearing, procedure, and appeals shall be had in conformity with the statutes and rules of the Corporation Commission now or hereafter in effect relating to oil and gas.

SECTION 6. That nothing in this Act shall be construed as repealing the laws of this State now in effect relating to rateable taking of natural gas, proration of natural gas, common purchasers of natural gas, price or terms of taking of natural gas, or well spacing of natural gas wells, but this Act shall be supplementary of such acts now in effect or enacted by this Legislature.

SECTION 7. The Corporation Commission is hereby authorized and empowered to punish, in contempt proceedings, any person, firm or corporation violating any order, rule or regulation entered pursuant hereto.

SECTION 8. The invalidity of any section, subdivision, clause or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force and effect from and after its passage and approval.

APPENDIX C
(1949)

SENATE BILL NO. 121—By LEONARD of the Senate and FIELD of the House

AN ACT TO CONSERVE NATURAL GAS IN THE STATE OF OKLAHOMA, TO PREVENT WASTE; PROVIDING FOR THE RATEABLE AND EQUITABLE TAKING THEREOF, GOVERNING THE PRODUCTION, MARKETING, PURCHASE AND SALE THEREOF, SUPPLEMENTING LAWS NOW IN EFFECT RELATIVE THERETO, SUPPLEMENTING THE AUTHORITY OF AND CONFERRING AUTHORITY ON THE CORPORATION COMMISSION; MAKING PROVISIONS OF THIS ACT SEVERABLE; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. The term "waste", as used herein, in addition to the ordinary meanings and in addition to the other meanings provided for in the oil and gas statutes of the State of Oklahoma now in effect or enacted by this Legislature, shall include Economic Waste and Wasteful Utilization of natural gas.

SECTION 2. (a) The Legislature of the State of Oklahoma hereby declares that the present low price of natural gas available to producers of natural gas in this State, the discrimination of the purchase and marketing of natural gas, the stifled markets of natural gas due to monopolistic control of markets of natural gas, the marketing of natural gas in excess of the reasonable and necessary market demands therefor, the inability of producers to expand existing markets or to develop new or larger markets for the natural gas produced in this State tend to prevent producers of natural gas and those in the employ of such producers and owners of minerals from contributing their

fair share to the support of the necessary governmental and educational functions and thereby tend to increase unfairly the tax burdens on the other citizens of the State, result in waste of natural gas, as such waste is defined herein, and in inequitable taking and marketing of natural gas in this State.

(b) The aforesaid conditions vitally concern the health, peace, safety and general welfare of the people of this State and result in the wasteful dissipation and wasteful utilization of natural gas, one of the great and irreplaceable resources of the State. It is declared to be the policy of this State to aid producers of natural gas in preventing or correcting adverse marketing conditions, improving existing marketing conditions, expanding existing markets, developing more orderly or efficient or equitable methods of taking, producing and marketing natural gas and thereby enabling the producers of natural gas, those in the employ of such producers and mineral owners to contribute their fair share to the support of necessary governmental and educational functions of the State and preventing the waste of natural gas.

(c) The provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State and for the purpose of preventing the waste of natural gas, one of the great natural resources of this State.

SECTION 3. For the purpose of carrying out and making effective the purposes of this Act, as expressed in the Legislative Declaration hereof, the Corporation Commission of this State is authorized and empowered and is directed to make and enter such orders and to make and prescribe such rules and regulations to regulate the production, taking, marketing, sale and purchase of natural gas and to fix and prescribe such a minimum price of natural gas at the wellhead or at the point of delivery by

producer or gatherer, in each common source of supply or field producing natural gas, as to prevent discrimination in the marketing, sale and purchase of natural gas, the marketing of natural gas in excess of market demand, the waste of natural gas and to promote the equitable and rateable taking of natural gas; the expansion of the existing markets for natural gas and the development of new markets for the same, in each source of supply or field producing natural gas. In fixing the price, terms and conditions of the taking and sale and purchase of natural gas, the Commission shall not be limited to the utility rule of "reasonable return on investment" but may take into consideration any and all factors, including economic waste, conservation and rateable purchasing, which, in the discretion of the Commission, shall be conducive to the attainment of the purpose of this Act. Provided, that the Commission may take into consideration the price of natural gas at the wellhead in adjoining states producing from a common source of supply in arriving at the price to be set in Oklahoma.

SECTION 4. Any producer, taker or gatherer of natural gas or any owner of mineral interests in any common source of supply or field producing natural gas in this State, may make application to the Corporation Commission for an order of said Commission, or the Commission may, on its own motion and after notice, make and enter an order prescribing rules and regulations governing the production, taking, marketing, sale and purchase, including a minimum price of natural gas at the wellhead, or producers' or gatherers' delivery point, and the terms and conditions of the production, taking, marketing and purchase and sale of natural gas in each common source of supply or field producing natural gas in this State.

SECTION 5. Notice of hearing, procedure, and appeals shall be had in conformity with the statutes and rules of the Corporation Commission now or hereafter in effect relating to oil and gas.

SECTION 6. That nothing in this Act shall be construed as repealing the laws of this State now in effect, relating to rateable taking of natural gas, proration of natural gas, common purchasers of natural gas, price or terms of taking of natural gas, or well-spacing of natural gas wells, but this Act shall be supplementary to such acts now in effect or enacted by this Legislature.

SECTION 7. The Corporation Commission is hereby authorized and empowered to punish, in contempt proceedings, any person, firm or corporation violating any order, rule or regulation entered pursuant hereto.

SECTION 8. The provisions of this Act shall be severable, and if any section or part of any section of this Act is declared to be unconstitutional, the remainder of the Act shall not thereby be invalidated.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

APPENDIX D

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 3982—Order No. 1662

IN THE MATTER OF THE INFORMAL COMPLAINTS OF MILTON THOMPSON AND THE HOME GAS COMPANY VS. THE CREEK COUNTY GAS COMPANY.

OPINION AND ORDER

By the Commission:

The complaints in this case are, in substance, that the fair price at the well in the Cushing Field is 9¢ per M. cu. ft.; that the Creek County Gas Company is purchasing gas at the wells of the complainant and from other wells and has been paying 6¢ per M. cu. ft.; that it recently made a contract with the Oklahoma Natural Gas Company whereby the Creek County Gas Company is receiving 10¢ per M. cu. ft. for gas so purchased.

On June 11th the Creek County Gas Company filed its answer admitting that it was receiving 10¢ per M. cu. ft. for all gas delivered to the Oklahoma Natural Gas Company and, in substance, stated the reason it had declined to pay 9¢ per M. cu. ft. for the gas was because the complainant, Home Gas Company, would not agree to sell the Creek County Gas Company its gas longer than the first of December; that there was a greater demand for gas during the winter months than the summer months; that the price of 9¢ means the average price for the entire year.

Upon filing of the answer by the Creek County Gas Company, admitting that it was receiving 10¢ per M. cu. ft. for gas, the Commission on the 12th day of June, 1920, issued an order requiring the Creek County Gas Company to pay the complainant and all other parties from whom it was purchasing gas in the Cushing Field, 9¢ per M. cu. ft. for all gas delivered since the 15th of April, 1920, and to

continue to pay said amount at each regular pay day until further order of the Commission, and enjoined Milton Thompson and the Home Gas Company, and all other parties whose wells are connected with the pipe lines of the Creek County Gas Company from disconnecting said wells or any of them until further order of the Commission, and notified all parties that the case was set for final hearing at the office of the Commission at Oklahoma City on the 25th day of July, 1920, at the hour of 10:00 o'clock a. m. and all parties who objected to making the order permanent were notified to appear and show cause why said order should not be permanent.

On the 25th day of April the Home Gas Company appeared by its attorney, president and secretary, Milton Thompsin in person, some royalty owners, and the Creek County Gas Company, by its attorney and president. The facts disclosed upon the uncontradicted evidence are substantially as follows:

That sometime during the month of March the Creek County Gas Company and the Oklahoma Natural Gas Company were negotiating in reference to making a contract for the sale of all the surplus gas under the control of the Creek County Gas Company, said gas when delivered to the Oklahoma Natural Gas Company was to be delivered by it to the consumers in the cities of Oklahoma, and it was represented that the minimum amount of gas to be delivered from the Creek County Gas Co. to the Oklahoma Natural Gas Company was 20,000,000 cu. ft. daily. Because of this volume of gas collected and ready for delivery the Oklahoma Natural Gas Company filed application with the Commission to advance its rates to the consumer so it would be able to pay the amount demanded by the Creek County Gas Company, the Creek County Gas Company representing to the Commission that the amount of increase it received was to be passed on and given to the well owners for the purpose of encouraging the drilling of wells. The Commission authorized the raise in rates,

effective March 15, 1920. The negotiations between the Creek County Gas Company and the Oklahoma Natural Gas Company not having developed into a contract for the sale of said gas on April 1st, the Commission rescinded its order, and upon a further showing that the contract had been made and gas delivered thereunder on the 15th day of April, 1920, the Commission reinstated its former order authorizing an increase to the consumers effective April 15, 1920, that is, all gas delivered to the consumers after the 15th day of April would be subject to the increased schedule.

The evidence further shows that all of the surplus gas was delivered to the Wichita Natural Gas Company by the Creek County Gas Company up to and including the 15th day of April, for which the Creek County Gas Company received 7¢ per M. cu. ft., and paid the well owners 6¢ per M. cu. ft.

The evidence also shows that the Creek County Gas Company increased the flat drilling rate for gas used under boilers per day of 24 hours from $10.00 to $15.00, representing to the consumers that this increase was made because the price of gas was increased at the well.

It was also shown by the testimony that less than 10% of the gas was used for drilling wells.

It was also shown from the testimony that the Creek County Gas Company had sent out notices to some of the gas producers and had talked to others over the 'phone to the effect that the price of gas would be increased at the well to 9¢ per M. cu. ft. on and after April first.

From the statements of the contentions made by the counsel for the complainants and defendants, the matters to be determined by the Commission at this time are as follows:

1st. The complainants contend that they should re-

ceive 9¢ per M. cu. ft. for gas from and including the first day of April, to and including the 15th day of April.

2nd. That complainants should not be enjoined from disconnecting their wells from the Creek County Gas Company's pipe lines.

1st. The Creek County Gas Company contends that having complied with the order of the Commission and paid 9¢ per M. cu. ft. from the 15th day of April, that it should not be required to pay 9¢ per M. cu. ft. during the first 15 days in April, because it only received 7¢ per M. cu. ft. for said gas during that period.

2nd. That the complainants should not be permitted to disconnect their pipe lines from the pipe lines of the Creek County Gas Company without being authorized by the Commission so to do.

As to the first proposition, that the Creek County Gas Company be required to pay 9¢ per M. cu. ft. to the defendant during the first half of April, it may be said that the Commission's jurisdiction in this case is derived under its general authority to regulate the sale and distribution of gas for public consumption throughout the State, also where controversy exists between the public service company and the well owners by virtue of a special statute, same being Section 3, Cahpter 198 of the Session Laws of 1913, which reads as follows:

> "Any person, firm or corporation, taking gas from a gas field, except for the purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall

be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas."

The Commission has the authority to prescribe the price that the Creek County Gas Company should pay for gas at the well; however, it was contended by the complainants that by virtue of the announcement and statements of the Creek County Gas Company that the price of gas at the well on and after April 1st would be 9¢, it thereby obligated itself to pay 9¢, and that the complainants were entitled to said amount. It was contended by the Creek County Gas Company that these statements were made, based upon the assumption that it would receive more for gas on and after April 1st in its final settlement with the Wichita Pipe Line Company, and that the Wichita Pipe Line Company refused to pay it; hence, the Creek County Gas Company received 7¢ for gas delivered to said Wichita Pipe Line Company during this period. It received for its services 1¢ per M. cu. ft. less the shrinkage and other expenses in gathering and delivering the gas to the Wichita Pipe Line Company. The shrinkage is estimated at from 5% to 10%; assuming that it was 5% it would leave the Creek County Gas Company about ½¢ per M. cu. ft. for the use of its facilities and the operating expense in delivering the gas.

The Commission announced at its hearing that in prescribing rates it gave no consideration whatever to contracts; that it dealt with the relative facts in prescribing rates and that all contracts attempting to fix rates between different public service companies, or between well owners and public service companies are void so far as they attempt to fix a rate which may affect the price of gas to the consumers. The Commission stated at the hearing, very clearly, that a complete public service utility for the furnishing of natural gas to consumers consisted of natural gas wells connected with pipe lines, which pipe lines were connected with the facilities of the consuming public.

The owner of a gas well may cap the same or use it for his own use and may refuse to sell any portion of said gas to the public, and may refuse to connect the well with the public utility pipe line, and may remain ansolute master of such gas well, but when he voluntarily connects the same with a public utility it becomes one of the essential parts of that utilty and is subject to the same rules and regulations by the Commission as the pipe lines of said utilities are subject to.

There are two grounds of jurisdiction of the Commission in this case:

Where private property is used for a public purpose to an extent that the public acquires an interest in the use, it is subject to regulation. To illustrate: When a gas well is by voluntary act of its owner connected with a pipe line, by that act the well owner holds out to the gas user that he is willing to supply them with gas so long as his well produces gas. The gas user relying upon this fact equips his premises with the necessary apparatus to burn the gas—can the well owner at any time that suits his whim or convenience disconnect his well and leave the gas users without gas, or possibly other fuel? We say not.

The principle involved is clearly defined by the United States Supreme Court in *Munn v. Illinois,* 94 U. S. 278, 24 L. Ed. 77, wherein the Court held:

> "When private property is devoted to public use, it is subject to public regulation.
>
> "A mere common law regulation of trade or business may be changed by a statute."

The Commission is given jurisdiction in this case by the express provisions of Chapter 93, Session Laws of 1913.

The term "public utility" as defined in the first section of said act, page 150, is as follows:

> "The term 'public utility', as used in this act, shall be taken to mean and include every corporation, as-

sociation, company, individuals, their trustees, lessees or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public."

The Corporation Commission under its jurisdiction and authority as hereinafter stated, prescribed rates to the public and fixed rates in case of dispute between well owners and pipe line owners, or between two pipe line companies, based upon the facts in each particular case and without any reference whatever to former or present contractual relations. The Commission may, at any time, regardless of so-called existing contracts, readjust the rates fixing the rate to the consumers, and then providing the rate so paid be apportioned equitably to the various agencies constituting the entire public service, from and including the well, to each intermediate agency assisting in performing the service; hence, in this case the plaintiff * * * are not entitled to 9¢ per M. cu. ft. for the first 15 days of April, 1920.

As to the increase of the drilling rate from $10.00 to $15.00 per day of 24 hours, it was contended by the Creek County Gas Company that the Commission had authorized a maximum rate of 20¢ per M. cu. ft. for temporary drilling purposes effective October 1, 1918, and that $15.00 per day flat rate did not equal the rate of 20¢ per M. cu. ft. as stated by complainant, Milton Thompson, that a boiler would consume from 80 to 100 cu. ft. per day. Without more definite information as to the average amount of gas consumed by boilers, the Commission will make no order at this time, but any user of gas under boilers will be permitted to introduce evidence to show that the amount paid for gas consumed under boilers is in excess of the rates prescribed by this Commission and if such showing is made the Commission will order a refund for all excess.

As to the contention that the complainants in this case be permitted to disconnect their wells from the pipe lines of the Creek County Gas Company, indirectly the pipe lines of the Oklahoma Natural Gas Company which is serving various cities and towns in the State of Oklahoma, is virtually disposed of by the law hereinbefore referred to. The Commission has never permitted a pipe line to discontinue service from the public or any portion of the public except upon the application and express authority from the Commission. The wells, when voluntarily connected being a part of the public utility, is subject to the same rules and regulations.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED, that the Creek County Gas Company shall pay to all well owners from whom it is purchasing gas in the Cushing Field on the basis of 9¢ per M. cu. ft. for all gas so taken since the 15th day of April, 1920, to the next regular pay day, and to continue to pay said amount at each regular pay day until further order of the Commission. By "pay day" is meant the day upon which the Creek County Gas Company has been paying for gas so purchased during the previous month.

The complainants herein, Milton Thompson and the Home Gas Company, and all other parties whose gas wells are connected with the pipe lines of the Creek County Gas Company are hereby ordered, restrained and enjoined from disconnecting said wells, or any of them that are now connected with the Creek County Gas Company's pipe lines until further order of the Commission.

Dated at Oklahoma City, Oklahoma, on this first day of July, 1920.

CORPORATION COMMISSION OF OKLAHOMA,
Art L. Walker, Chairman;
Campbell Russell, Commissioner.

Attest: P. E. Glenn, Acting Secretary.

APPENDIX E

Chapter 198, Okla. Sess. Laws 1913:

"NATURAL GAS—OWNERSHIP DEFINED AND OUTPUT RESTRICTED.

"Senate Bill No. 130.

"AN ACT defining ownership of natural gas, providing for the taking of same and making it larceny to take natural gas except as herein provided.

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"Ownership defined.

"Section 1. All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees, of the surface under which gas is located in its original state. (52 O. S. 1941, sec. 231).

"Rights of owners—restrictions on output.

"Section 2. Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells

by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well. (52 O. S. 1941, sec. 232).

"Purchasers of output—prices and amounts of gas to be taken.

"Section 3. Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas. (52 O. S. 1941, sec. 233).

"Taking more than share of gas—damages and penalties.

"Section 4. Any person, firm or corporation, taking more than ~~his~~ or its proportionate share of such gas, in violation of the provisions of this act, shall be liable to any adjoining well owner for all damages sustained thereby and subject to a penalty for each violation not to exceed five hundred dollars ($500.00), and each day such violation is continued shall be a separate offense. (52 O. S. 1941, sec. 234).

"Violations of act—punishment.

"Section 5. Any person or agent of a corporation, who takes gas, or aids or abets in the taking of gas, except as herein provided, either directly or indirectly, as an individual, officer, agent, or employee of any corporation, shall be guilty of grand larceny, and, upon conviction thereof, shall be sentenced to the penitentiary not to exceed five (5) years. (52 O. S. 1941, sec. 235).

"Approved May 16, 1913."

APPENDIX F

Chapter 197, Okla. Sess. Laws 1915:

"NATURAL GAS—WASTE.

House Bill No. 395.

"AN ACT to conserve natural gas in the State of Oklahoma, to prevent waste thereof, providing for the equitable taking and purchase of same, conferring authority on the Corporation Commission, prescribing a penalty for violation of this Act, repealing certains acts, and declaring an emergency.

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"Waste prohibited.

"Section 1. That the production of natural gas in the State of Oklahoma, in such manner, and under such conditions as to constitute waste, shall be unlawful. (52 O. S. 1941, sec. 236).

"Waste defined.

"Section 2. That the term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas. (52 O. S. 1941, sec. 237).

"Conservation of Gas.

"Section 3. That whenever natural gas in commercial quantities, or a gas bearing stratum, known to contain natural gas in such quantity, is encountered in any well drilled for oil or gas in this state, such gas shall be confined to its original stratum until such time as the same can be produced and utilized with-

out waste, and all such strata shall be adequately protected from infiltrating waters. Any unrestricted flow of natural gas in excess of two million cubic feet per twenty-four hours shall be considered a commercial quantity thereof; provided, that if in the opinion of the Corporation Commission, gas of a lessor quantity shall be of commercial value, said Commission shall have authority to require the conservation of said gas in accordance with the provisions of this Act; and provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for the period of three days. (52 O. S. 1941, sec. 238).

"Excess Gas Supply—Apportionment.

"Section 4. That whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right

to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. (52 O. S. 1941, sec. 239).

"Common Purchaser—Fair Treatment.

"Section 5. That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas ~~and~~ shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade. (52 O. S. 1941, sec. 240).

"Hearings Before Corporation Commission—How Conducted.

"Section 6. That any person, firm or corporation, or the Attorney General, on behalf of the state may institute proceedings before the Corporation Commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this Act; and jurisdiction is hereby conferred upon said commssion to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein by publication in some newspaper or newspapers having general circulation in the state, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction said commission is authorized to summon witnesses, make ancillary orders, and use such means and final process including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law. (52 O. S. 1941, sec. 241).

"Appeals to Supreme Court.

"Section 7. That appellate jurisdiction is hereby conferred upon the Supreme Court of this state to review the orders of said commission made under this Act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from, may be superseded by the commission or by the Supreme Court upon such terms and condition as may be just and equitable. (52 O. S. 1941, sec. 242).

"Power of Corporation Commission—Rules and Regulations.

"Section 8. That the Corporation Commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents, with the consent of the Governor, as may be necessary to enforce this Act. (52 O. S. 1941, sec. 243).

"Acceptance by Pipe Lines.

"Section 9. Before any person, firm or corporation shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain, construct or operate pipe lines, fixtures, or equipments belonging thereto or used in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business of purchasing, piping, or transporting natural gas, as a public service, or otherwise, such person, firm or corporation, shall file in the office of the Corporation Commission a proper and explicit authorized acceptance of the provisions of this Act. (52 O. S. 1941, sec. 244).

"Duties of Mine Inspector Unchanged.

"Section 10. That nothing contained in this Act shall be construed to interfere with any duties now imposed by law upon the Chief Mine Inspector of the state or his deputies. (52 O. S. 1941, sec. 245).

"Validity of Several Sections of Act Independent.

"Section 11. That the invalidity of any section, subdivision, clause, or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof. (52 O. S. 1941, 246).

"Penalties for Violation.

"Section 12. That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of contempt jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment. (52 O. S. 1941, sec. 247).

"Emergency.

"Section 13. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in force from and after its passage and approval.

"Approved March 30, 1915."

Chapter 3, Title 52, Section 3, Okla. Session Laws 1945:

"Waste of Gas—Definition.

"Section 3. Section 86, Title 52, Oklahoma Statutes, 1941. is hereby amended to read as follows:

" 'Section 86. The term "waste", as applied to gas, in addition to its ordinary meaning, shall include the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply; the inefficient or wasteful utilization of gas from gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the es-

cape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in the efficient drilling, completion, or operation thereof; waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing, or releasing, directly or indirectly, into the open air, of gas from wells productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply. In order to prevent the waste or to reduce the dissipation of gas energy contained in a common source of supply, in addition to its other powers in respect thereof, the Commission shall have the authority to limit the production of gas from wells producing gas only to a percentage of the capacity of such wells to produce. The production of gas in the State of Oklahoma in such manner and under such conditions as to constitute waste as in this Act defined is hereby prohibited, and the Commission shall have authority and is charged with the duty to make rules, regulations, and orders for the prevention of such waste and for the protection of all fresh water strata and oil or gas bearing strata encountered in any well drilled for gas.' "

No. 153

Supreme Court of the United States

OCTOBER TERM, 1950.

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,
VERSUS
PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

APPELLANT'S REPLY BRIEF

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October, 1950.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8780

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APPELLANT'S REPLY BRIEF

ARGUMENT

Right of Appellant to question constitutionality of statutes.

Appellees in their brief advance the untenable and frivolous contention that Appellant is barred from questioning the constitutionality of 52 O. S. 1941, 233 and 239, because by entering the State as a foreign corporation and engaging in business after the enactment of the questioned statutes it accepted the terms and provisions thereof. A long list of cases is cited by Appellees to support their contention, including *Wheeling Steel Corp.* v. *Glander,* 337

U. S. 562, 571, 93 L. Ed. 1544, 1551. In the *Glander* case this Court said that the State may arbitrarily exclude a foreign corporation or may license it upon any terms it sees fit *but it cannot exact surrender of its rights derived under the Constitution of the United States.*

Appellant, as shown by the record, has at no time acquiesced in or recognized the validity of either of the statutes involved with respect to price-fixing. Appellant has conducted its business in Oklahoma under State license for many years before the issuance of the orders in question in this case and before the statutes in question were construed by the Supreme Court of Oklahoma to authorize price-fixing. The authority of Commission in this case to fix the price of gas has been challenged by Appellant at every stage of the proceeding from its very inception. Appellant has at no time invoked the power which it now assails, neither has Appellant accepted any benefits under the Act with respect to price-fixing.

The foregoing facts cannot be disputed. In *Connecticut Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, this Court had occasion to consider the same contention as is now advanced by Appellees and in response thereto said:

> "No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut Gen. L. Ins. Co.* v. *Johnson, supra,*

> to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover F. Ins. Co.* v. *Harding (Hanover F. Ins. Co.* v. *Carr)* 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713; compare *Kentucky Finance Corp.* v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. Ed. 1112, 43 S. Ct. 626."

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400, 72 L. Ed. 927, 929, it is stated:

> "It is established that a corporation by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."

Compare *Buck* v. *Kuykendall*, 267 U. S. 307, 316, 317, 69 L. Ed. 623, 627.

In *Republic Nat. Gas Co.* v. *State*, 198 Okla. 350, 180 Pac. (2d) 1009, Appellees, Peerless Oil and Gas Company and Corporation Commission of Oklahoma, made the same contention as here advanced. The Supreme Court of Oklahoma in that case sustained their contention. The case was, however, appealed to this Court, 334 U. S. 62, 92 L. Ed. 1212. Although the appeal was dismissed because the order and judgment appealed from was not final, this Court in dismissing the appeal said, in the last line of the opinion,

"all of Republic's constitutional objections are of course saved." If Republic, as decided by the Oklahoma Supreme Court in the *Republic* case, had waived its constitutional right to attack the validity of one of the very statutes here under question, how could its constitutional objections thereto be saved? It is impossible to save a constitutional objection and at the same time lose it by estoppel or waiver. That there is no merit to the contentions of Appellees in this respect is further evidenced by the fact that in this case in the Supreme Court of Oklahoma they made the very same contention as here made but the Supreme Court of Oklahoma did not even deem it of sufficient importance to mention it in its opinion. Apparently the Supreme Court of Oklahoma, since the decision of this Court in the *Republic* case, is now of the opinion that *Pierce Oil Corp.* v. *Phoenix Rfg. Co.*, 259 U. S. 125, 66 L. Ed. 855, is not applicable to the facts of this case as evidenced by the record. The contention of Appellees that Appellant has waived its right to and is estopped from attacking the constitutionality of the statutes in question is not well taken and should be rejected.

Is the Supreme Court of Oklahoma lawfully empowered within the meaning of the provisions of the 14th Amendment, as applied to Appellant, to interpolate into 52 O. S. 1941, 239, an unambiguous state act pertaining solely to the conservation of natural gas as a commodity, a price-fixing policy with respect thereto where the State Legislature has not either declared any such policy or provided in the act any standard to guide a state commission in the exercise thereof?

Appellees have not only misconceived but have wholly disregarded the issue before the Court under this proposi-

tion. The question here does not concern the power of the Oklahoma Legislature to enact a gas price-fixing measure. It relates solely to the power of the Oklahoma Supreme Court as a judicial body to write into a state statute, under the guise of interpretation, gas price-fixing powers where the State Legislature has not done so or provided in the statute any standard to guide Commission in exercising such claimed right, but, on the contrary, has specifically declared against any such gas price-fixing policy for the State of Oklahoma. In every price-fixing case cited either in Appellant's brief or Appellee's brief the State Legislature or the Congress, as the case may be, has expressly and specifically conferred upon a subordinate agency such authority and provided a standard to follow even though general. In *Nebbia* v. *New York*, 291 U. S. 502, 537-538, 78 L. Ed. 940, 956, which is the basic price-fixing case, this Court said:

> "Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

This Court said further:

> "The courts (including the Oklahoma Supreme Court) are without authority to declare such policy or, when it is declared by the Legislature, to override it" (Insert supplied).

The only policy with respect to gas price-fixing that the Oklahoma Legislature has ever declared is set forth in the

Interstate Compact to Conserve Oil and Gas adopted by the Legislature of Oklahoma by Statute 52 O. S. 1941, 204, in 1935, long after the enactment of the 1913 and 1915 Acts before the Court in this case. That policy is set forth in this plain and unambiguous language:

> "It is not the purpose of this Compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof." Article V, Compact.

It is thus abundantly clear that the Oklahoma Legislature has declared itself to be opposed both to the principle and to the practice of price-fixing.

Appellees contend that Appellant "asserts that this Court may reverse a State Court's construction of said statute if this Court would construe it differently" (Appellees' Br. 20). This is not a correct statement of Appellant's position. Appellant, however, does assert and does contend that, where the language of a state statute is plain, there is no room for interpretation and that the plain language of the Legislature controls. The want of price-fixing provisions in the unambiguous Oklahoma statute to make it constitutional cannot be cured by the Oklahoma Supreme Court's inserting them in judgments under it. To permit such a defect in the law to be cured by construction given to the plain words of the statute by the court having final authority to declare their intent violates the first essential of due process. *Louisville & N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 219, 58 L. Ed. 1284, 1286; *Nebbia* v. *New York*, 291 U. S. 502, 537,

78 L. Ed. 940, 947. Moreover, when the interpolation, as here, seeks to clothe the State with a valid exercise of the police power, and thus defeat Appellant's rights under the Federal Constitution, this Court can and should determine the meaning and effect of the statute independently, as applied by said order to Appellant. *Bain Peanut Co.* v. *Pinson*, 382 U. S. 499, 501, 75 L. Ed. 482, 490, 491. Compare reasoning in *A., T. & S. F. Railroad Co.* v. *Mathews*, 174 U. S. 97, 110, 43 L. Ed. 909, 911, and *John Larson* v. *State of South Dakota*, 278 U. S. 430, 433, 73 L. Ed. 441, 444.

Appellees contend further:

> "The statute (52 O. S. 1941, 239) is not void for failure to provide a standard of policy to guide the Commission in fixing the price. It grants the Commission no arbitrary power in that respect" (Appellees' Br. 47).

Appellees then proceed to cite cases where this Court has approved such general standards as "fair and reasonable", "fair and equitable", "unreasonable", "undesirable aliens" and "reasonable and just." An examination of the cases wherein this Court has approved these very general standards will reflect that such standards were as specific a formula as the circumstances of the subject matter would permit. The rule was laid down because the field was one where flexibility and the adaptation of Congressional policy to infinitely variable conditions constituting the essence of the program required it. Compare *Lichter* v. *United States*, 334 U. S. 742, 785, 92 L. Ed. 1694, 1726, 52 O. S. 1941, 239. The statute upon which the Court said Commission's price-fixing authority was based, does not contain even a sem-

blance of a standard. As evidenced by Appendices "A", "B" and "C" price-fixing is subject to a specific formula.

Appellees in their brief rely heavily on the words "equitable purchasing", set forth in 52 O. S. 1941, 240, as a standard to guide Commission in the exercise of price-fixing authority which the Oklahoma Supreme Court decided Commission possessed by implication under 52 O. S. 1941, 239. In the first place, 52 O. S. 1941, 240, relates solely to common purchasers. Order 19514 of Commission is directed against production and not to common purchasers as such. In addition, the Oklahoma Supreme Court confined the authority of Commission in its promulgation of Order 19514 solely to 52 O. S. 1941, 239. It did not so much as hint that "equitable purchasing" might have the meaning which Appellees seek to ascribe to it. Even if it could be assumed that "equitable purchasing" is the standard in this case, Commission would be required to fix a price, taking due account of prevailing market conditions relevant to the price to be paid, as described by the minority opinion of this Court in *Republic Nat. Gas Co. v. Oklahoma,* 334 U. S. 62, 99, 92 L. Ed. 1212, 1236. As stated by MR. JUSTICE HALLEY in his dissenting opinion in the case at bar (R. 923), "any other price would be unfair, discriminatory and inequitable." The price fixed by the Commission and applied to Appellant practically doubles the going or market price in the field. To say the least, this does violence to any concept of "equitable purchasing." It is simply arbitrary, unreasonable and capricious action, in direct violation of the due process clause.

Appellant submits that, as applied to it in this case, to permit the Oklahoma Supreme Court to interpolate into

the unambiguous act in question a price-fixing policy where the State Legislature has neither declared any such policy nor provided in the Act any standard to guide the exercise thereof, but, on the contrary, has expressly declared against such a policy, is arbitrary, unreasonable, and capricious action by a judicial tribunal and violative of the due process clause of the Federal Constitution. *Nebbia* v. *New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 947.

The Natural Gas Act and Interstate Commerce

Appellees state in their brief that Appellant contends that the orders of the Corporation Commission of Oklahoma and the judgment of the Supreme Court upholding them as valid violate the provisions of the Natural Gas Act, as amended, 52 Stat. 821, 15 U. S. C. A. 717, *et seq.*

Appellant has made no such contention, but has relied on the point that the orders of the Oklahoma Corporation Commission violate the commerce clause of the Federal Constitution because they cast an undue burden upon and discriminate against interstate commerce and the interstate operations of Appellant and that any claimed violation of the Natural Gas Act would in effect be merely cumulative to such argument.

Whether Congress, by enactment of the Natural Gas Act, has entered the field of regulation of sales of natural gas in interstate commerce by independent producers, such as those who sell gas to Appellant in the Guymon-Hugoton Field, has not been drawn in question by specific assignment of error, either in the court below or in this Court.

Until recently Federal Power Commission has given a negative answer to that question. *In re Columbian Fuel Corp.* v. *Federal Power Comm.*, 2 F. P. C. 200, F. P. C. Order No. 139 dated August 7, 1947. However, the question has become the subject of considerable debate since the decision by this Court in the case of *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 91 L. Ed. 1742, which was handed down after Appellant had perfected its appeal in the court below.

Although Appellant does not believe that Congress intended to include such field sales of gas within the ambit of regulation under the Natural Gas Act, it recognizes that if its views in this respect are erroneous the orders of the Corporation Commission of the State of Oklahoma violate the provisions of a federal statute and therefore are void. In that event Appellant assumes that this Court will, in its discretion, consider such violation as error under Section 6, Rule 27, of the Rules of this Court. *Seaboard Airlines Co.* v. *Daniel*, 331 U. S. 118, 122, 92 L. Ed. 580, 585; *United States* v. *Corrick*, 298 U. S. 435, 440; 80 L. Ed. 1263, 1268; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 76 L. Ed. 330, 342.

Irrespective, however, of the question whether the Natural Gas Act confers upon the Federal Power Commission the power to fix field prices of gas such as those here involved and assuming that Congress deliberately intended to leave such field prices of gas free from regulation, because of the competitive situation with other fuels, Appellant contends that the orders violate the commerce clause for the additional reason that they seriously impair

and impede the administration and enforcement of the provisions of the Natural Gas Act.

Under the Natural Gas Act, Federal Power Commission is required to fix just and reasonable rates for Appellant's sales of gas at city gates in its five-state service territory. The field wide order affects not only Appellant but other producers and purchasers, including other interstate pipe line companies which now or hereafter may obtain their gas from the producing structures of the Guymon-Hugoton Field for interstate transportation and sale. Ninety per cent of the gas produced in the Guymon-Hugoton Field goes into interstate commerce. Thus, it is obvious that the Federal Power Commission would be confronted with chaotic conditions in its efforts to perform in an orderly manner the functions delegated to it by Congress, including the fixing of just and reasonable rates at city gates. It would be faced with the necessity of adjusting and readjusting such rates as often as the Corporation Commission of Oklahoma changed the price and measurement provisions of its field wide order. The impact of such state orders clearly would frustrate and make quite futile any attempt of Federal Power Commission to effect an orderly regulation of the interstate transactions entrusted to it and would thereby so obstruct and interfere with interstate commerce as to be an unlawful contravention of the commerce clause of the Federal Constitution.

Other Contentions of Appellees

On page 17 of their brief Appellees assert "there is no competitive market for gas in the Hugoton Field, it having

been stifled by the control of acreage and markets by the pipeline operators therein * * *." Commission claims that as a result of this control "natural gas is being taken out of the Guymon-Hugoton Field at a price less than its actual or fair market value * * *" (R. 16). The assertion that there is no competitive price for gas in said field is not borne out by the record. Attention is here directed to the terms and provisions of Cities Service's gas purchase contract with Republic Natural Gas Company, the owner of about 96,000 acres of leases dedicated to Appellant's pipeline (R. 40). This contract plainly shows that the price of gas thereunder is subject to adjustment after March 1, 1951 (R. 717-718). The contract requires the price to be adjusted and established for each five-year period, first, by agreement of the parties, and second, in the event the parties are unable to agree, by arbitration (R. 718). The gas purchase contract between Cities Service and Skelly Oil Company, the owner of approximately 47,000 acres of leases dedicated to Appellant's pipeline (R. 402, 688), contains a provision for the adjustment of price in the event buyer (Appellant) pays more or less to some other seller in the field from whom it may purchase gas (R. 703-704). The gas purchase contract between Cities Service and Harrington & Marsh, the owner of approximately 75,000 acres of leases in the pool under contract to Appellant (R. 795), provides that the contract shall remain in force until January 22, 1947, and continue thereafter unless cancelled on such expiration date or on the 22nd day of any succeeding month, thereby giving a right to seller to terminate said contract at its option (R. 801).

The companies in addition to Appellant transporting gas out of the pool are Southwest Public Service Company, Phillips Petroleum Company, and Panhandle Eastern Pipe Line Company (R. 386). The latter company technically does not take gas from the field but purchases the gas from Phillips Petroleum Company after Phillips has produced and transported it to Texas where the actual sale and delivery is made by Phillips to Panhandle Eastern. Appellant does not have any interest in or control over any of these companies, directly or indirectly (R. 393).

In the face of these undisputed and indisputable facts, the assertion of Appellees that there is no competitive market for gas in the Hugoton Field or that the price under said contracts are in any manner controlled is wholly without foundation in fact and is simply not true.

Samples of Appellees' distortion of the record to suit their desires are here given. On page 13 of their brief they contend that Peerless tendered its gas to Appellant at six cents (6¢) per Mcf, then say, "Stanolind's and Magnolia's gas which Cities has contracted to purchase at six cents in the Hugoton Field" (R. 419). They also include Harrington & Marsh (p. 65 Appellee's Br.) (R. 410). At the outset of their brief (p. 1) Appellees say, "and the Guymon-Hugoton Gas Field will be called the 'Hugoton Field', or 'the field.'" Even a casual perusal of the record will show that the contracts of Appellant with Stanolind and Magnolia are in the Kansas portion of the Hugoton Gas Field and wholly outside the jurisdiction of the Oklahoma Commission (R. 418-419). That Appellant had no contract with Harrington & Marsh except the one shown in record (R. 795).

In their brief Appellees allege that Appellant refused to take the gas of Peerless unless Peerless would dedicate to it the gas from all its leases in the pool for the life of the Peerless leases (Appellees' Brief, p. 16) (R. 15, 24). In support of their contention they cite Findings 20 and 21 of the Commission (R. 15). The record absolutely refutes such an assertion; see paragraph 4 of Appellant's answer filed with Commission (R. 48, 548—Par. 9, Order 17867). The record shows that Appellant has been at all times ready and willing to take by purchase the Peerless gas as well as any other producer's gas tendered to it in compliance with Commission's subsisting rules and regulations, at the going price in the field (R. 48, 548—Par. 9, Order 17867). As a matter of fact Peerless in its application so concedes (R. 33).

On page 55 of their brief Appellees say, "Appellant was already discriminating as between producers, both in the taking of gas and in the price paid. It took the gas from some and refused to take it from others and it paid a different price to the various sellers." An examination of the answer of Appellant (R. 48), the application of Peerless (R. 33) and Appellant's respective subsisting gas purchase contracts (R. 688, 713, 795) completely refutes such contention. It is wholly immaterial whether Appellant is a common purchaser, a common carrier or a public utility because it has at all times been ready and willing to accept and take by purchase the gas of any producer in the field, at the going price therein. This conclusion is adequately supported by the decision of the Oklahoma Supreme Court in *Republic Nat. Gas Co.* v. *Okla.*, 198 Okla. 350, 180 Pac. (2d) 1001, where it was held that regardless of whether

the taker is a common purchaser, a common carrier, or a public utility, it is required to take the gas of any producer, when properly tendered, to prevent drainage.

Appellees, on page 43 of their brief, say, "the statement that correlative rights of owners were being protected is simply not true. Appellant's refusal to take their gas, except under contract for the life of the lease and at a non-competitive price fixed by it, with the alternative of suffering the drainage of their leases, did not constitute the protection of their correlative rights, and therefore the order was not arbitrary and was not irrelevant to the State's policy of protecting the rights of owners and lessees." These assertions are certainly incorrect in view of the record. No question of drainage can be involved in this case because Appellant has at all times been willing to take by purchase any gas properly tendered to it at the going price in the field. The taking of the Peerless gas under the stipulation eliminates any question of drainage (R. 90). The only dispute there is in this case relates to a change of measurement base and the fixing of a price higher than the going or market price in said field. Appellant feels confident this Court will readily see that Appellees' unfounded assertions regarding drainage and protection of correlative rights are but an evasive method by which Appellees seek to justify the arbitrary and capricious action of Commission in fixing a price based on nothing more substantial than its whim or fancy at the time. Mr. Justice Rutledge in *Republic Nat. Gas Co.* v. *Okla.*, 334 U. S. 62, 99, 92 L. Ed. 1212, 1236, clearly indicated that the Commission, on the contrary, would be required to take "due account of prevailing market conditions relevant to the price to be paid."

Any assertion that Appellant "controls" the price of gas in the field is rendered absurd by the plain provisions of the above quoted contracts which show that after the fixed period stated therein Appellant has no control whatever over the price to be paid for natural gas.

Appellees further contend, on page 45 of their brief, that the limiting of the orders solely to the Guymon-Hugoton Field does not constitute a denial of equal protection of the laws. They assert that conditions differ in different fields. This is not the question. The ultimate test is not whether one gas field differs from another but whether the differences between them are pertinent to the subject with respect to which the classification is made; that is, in this case, price and measurement base; *Met. Casualty Co.* v. *Brownell,* 294 U. S. 580, 583, 79 L. Ed. 1070, 1072. It is the further contention of Appellees that the burden is upon Appellant to show that conditions in other fields are so like those in the Hugoton Field with respect to price and measurement base as to require the same order. Appellant does not concede this to be correct because Peerless, as well as Commission and Land Office, has limited the hearing in this case to one gas field, namely, the Guymon-Hugoton Pool. Moreover, the rule with respect to the question here presented is laid down in *Met. Casualty Ins. Co.* v. *Brownell, supra,* to the effect that courts may not declare a legislative discrimination invalid unless viewed in the light of facts *made known or generally assumed, which are of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators.* This Court held, in *Mayflower Farms* v. *Ten Eyck,*

297 U. S. 266, 274, 80 L. Ed. 675, 679, that in the absence of any showing of reasonable basis for the classification made by statute, the Court has no right to conjure up possible situations which might justify the discrimination. Regardless of these cases, the record in this case shows that Commission by statewide rules and regulations in effect at the time of the hearing (R. 637) defined a cubic foot of gas for reporting purposes (R. 644, No. 15); that is, by statewide rule, Commission says that gas shall be measured for reporting purposes on the same basis in every field in the State. This of itself is an acknowledgment by Commission that gas can and should be measured upon the same basis in every field; that no good reason exists to measure gas in one field on a different basis as distinguished from other fields. The Department of Interior, United States Geological Survey operating regulations to govern the production of oil and gas under the Act of February 25, 1920 (R. 578) promulgate a uniform rule for the measurement of gas. These regulations applied to the measurement of gas produced on all the public lands of the United States, wherever located. Commissioners of the Land Office adopted those rules with respect, among other things, to the measurement of gas produced from all lands owned by the State of Oklahoma, wherever located (R. 578). Specific attention of this Court is directed to the measurement formula set forth in said regulations (R. 578, 579). Appellant reiterates here its contention as consistently made throughout this brief—that the arbitrary selection of the Guymon-Hugoton Pool for special treatment by Commission with respect to price and measurement base is a denial to Appellant, who is a producer and purchaser in many

gas fields in the State of Oklahoma (R. 636A), of the equal protection of the laws in violation of the equal protection clause of the Federal Constitution. No good reason does or can exist, in the light of this record, which would justify or even require the discrimination apparent in this record. This is particularly true when a change in the existing measurement base is utilized for increasing the price of gas in one field to the exclusion of other fields and in connection therewith and at the same time practically doubling the going or market price in that certain field. No greater burdens should be laid upon one than are laid upon others in the same calling and condition; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 925.

On page 43 of Appellees' brief they impliedly concede no physical waste of gas in the field when they say, "if there was no physical waste of gas in the field, it was because the producers who had no outlet did not blow their gas into the air * * *." None of the gas statutes of Oklahoma covers economic waste, although the oil statutes do. Laws 1945, p. 156, Sec. 2. If the Legislature had intended to cover economic waste, it would have so stated in the gas conservation acts, as it did in the oil conservation acts.

Appellees contend "if the price for gas is too low the producers will abandon their wells long before all the recoverable gas has been recovered, resulting in actual physical waste" (Appellees' Brief, p. 9). Nothing in the record indicates abandonment of the Guymon-Hugoton Field within the foreseeable future at any given pressure. The average original pressure in the field was about 432 lbs. (R. 72). During the year ending May, 1946, the field pressure had been reduced by 7½ lbs. (R. 74). Since the

first well in the field was drilled in 1924 (R. 71-72), it follows that 22 years were required to reduce the pressure by $7\frac{1}{2}$ lbs. If the price-fixing order of Commission is to prevent an early abandonment of the field, it is certainly premature. It can hardly be contended that it is necessary to increase the price now to prevent abandonment of the field 20 or 30 years hence. What Commission has sought to do obviously bears no reasonable relationship to the end sought to be accomplished.

Every prudent gas producer knows, and the Legislature of Oklahoma, as well as the Commission, has recognized that in drilling, completing and operating gas wells it is necessary to vent some gas. In this connection we direct the specific attention of the Court to the statewide rules of Commission (R. 663) relating to conditioning of wells. There it is said, "nothing contained in these rules shall be construed as prohibiting the blowing of wells when such blowing is necessary for efficient operation." The same rules provide for acidization and chemical treatment of wells for production (R. 652). The Statutes of Oklahoma, 52 O. S. 1941, 238, provide, among other things, "* * * and provided further, the gauge of the capacity of any well shall not be taken until such well has been allowed an open flow for the period of three days" (Append. F, p. xxi) The 1945 Sess. L. Okla. (Append. F, p. xxvi), in prohibiting waste, provide:

> "The escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only drilled into any common source of supply, *save only such as is necessary in the efficient drilling and completion thereof* * * *" (Italics supplied).

The evidence of Rae (R. 361-363), of Hanley (R. 367-371), and of Frank (R. 373-375), is not contradicted and shows the necessity of acidization and chemical treatment in the efficient drilling and completion of wells in this pool. The record is devoid of any evidence that this Appellant, or any other producer in the pool, has committed waste, as defined by the Oklahoma Statutes, in the drilling or completion of wells.

Appellees contend that the proceeding resulting in the two orders in question was legislative and not judicial in character (Appellees' Brief, p. 50). They assert, "the fixing of a price at which a commodity shall be purchased or sold is a legislative and not a judicial act." That this is not true when it concerns the settlement of a dispute between private parties is well established by the Supreme Court of Oklahoma in *Cimarron Utilities Co.* v. *Safranko,* 187 Okla. 86, 101 Pac. (2d) 258.

Appellees contend that Field Order 19514 of Commission is not ambiguous. On page 55 of their brief they say, "it (Order 19514) requires *purchasers* to pay the same price upon the same basis of measurement and thus not only prevents *Appellant and other purchasers from discriminating as between sellers,* but it makes the *same requirement of all purchasers,* and thus prevents discrimination as against Appellant." Peerless in its answer brief before the State Supreme Court (p. 72), said:

> "Insofar as the field order (19514) is concerned, attention is called to the fact that it fixes the price or value of natural gas in the Guymon-Hugoton Field in the producing formations, and provides that natural gas may not be taken out of the producing formations

> at less than 7¢ per Mcf. The Commission's order has its effect before the gas has been produced, or at least at the very instance of its production, and before the gathering process has begun, as well as before the interstate journey has commenced."

Commission and Land Office in their answer brief before the State Supreme Court (p. 29), say, in referring to the field order:

> "Here the Corporation Commission determined the price below which gas would not be permitted to be produced."

The Supreme Court of Oklahoma, although duly requested by Appellant, failed to clarify the meaning and extent of the field order. What more proof is necessary to disclose the vagueness and indefiniteness of this order? If the Appellees themselves take different positions at different times as to its meaning and extent, and the Supreme Court has not clarified the meaning of the order, how can Appellant be expected to hazard a guess at the meaning and extent of said order under dire penalties for an error in so guessing?

The foregoing substantially covers the important and material contentions of Appellees in their brief. Appellant submits that in the light of the undisputed and indisputable facts in the record the orders of Commission in this case, as well as the Statutes of Oklahoma upon which said orders are based, as applied to Appellant, clearly disclose not only that said orders and said statutes, as applied, violate the due process and equal protection clauses of the Federal Constitution but also that same cast an undue

burden upon and discriminate against interstate commerce and the interstate operations of Appellant.

CONCLUSION

For all reasons here urged and those in Appellant's original brief, the final judgment of the Oklahoma Supreme Court should be reversed and declared void because in violation of the Federal Constitution.

Respectfully submitted,

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October, 1950.

No. 153

Supreme Court of the United States

OCTOBER TERM, 1950.

CITIES SERVICE GAS COMPANY, a corporation,
Appellant,

VERSUS

PEERLESS OIL AND GAS COMPANY, a corporation; CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; STATE OF OKLAHOMA EX REL THE COMMISSIONERS OF THE LAND OFFICE, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION; AND PHILLIPS PETROLEUM COMPANY, a corporation,
Appellees.

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October, 1950.

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APPELLEES' BRIEF

Herein, Peerless Oil and Gas Company will be called "Peerless"; Cities Service Gas Company will be called "Cities"; the Corporation Commission of Oklahoma will be called "the Commission"; and the Guymon-Hugoton Gas field will be called the "Hugoton field" or "the field".

Figures in parentheses denote pages of the printed record. All italics are ours.

STATEMENT OF THE CASE

This appeal questions the constitutional validity of two orders of the Commission numbered 19514 and 19515, both made in the same proceeding on December 9, 1946,

and of the statutes of the State construed by its Supreme Court to authorize the orders.

Order No. 19515 is against Cities by name, and requires it to take natural gas ratably from Peerless' wells in the Hugoton field, and to pay therefor not less than 7 cents per MCF at the well measured at a pressure of 14.65 lbs. per square inch. That order also provides that no gas shall be taken from that field at a price less than 7 cents per MCF at a pressure of 14.65 lbs.

Order No. 19514 is general, that is, is not directed to any company by name, but is intended to have general application to all purchasers of gas in the field, and it provides that no gas shall be taken therefrom at a price less than 7 cents per MCF at a pressure of 14.65 lbs.

In accordance with Sec. 18, Art. IX of Oklahoma's Constitution, personal notice of the proceeding was served upon Cities against which by name the proceeding was instituted, and publication of notice to all persons interested but not named was made as a basis for the general order.

The Applications

The application (31) was filed by Peerless on October 12, 1945. It alleged in substance:

Cities is a Delaware corporation having a permit to do business in Oklahoma. Peerless owns an oil and gas lease in the Hugoton field on which it has completed and equipped two producing wells. Cities is engaged in producing gas in that field from the same common source of

supply, and is taking gas therefrom for purposes other than the development of a gas or oil field, operating an oil well, or for its own domestic use. It is also engaged in the transportation of gas from the common source for compensation, hire and otherwise, is a common purchaser thereof under the laws of Oklahoma, and is draining and appropriating the gas from Peerless' lease. Cities is the owner of a pipe line near Peerless' lease and is engaged in the purchase, transportation and sale of gas from the same common source of supply, but is not taking gas from Peerless' wells ratably with its own wells and other wells from which it is taking gas, thereby taking an unfair proportion of the gas from the common reservoir.

Production in the Hugoton field is in excess of market demand, and by the drainage of its lease Peerless is suffering irreparable loss and damage.

On May 7, 1945, Peerless informed Cities in writing of the completion and equipment of its well, and tendered it the gas to be produced therefrom, and offered to sell and deliver the same to it in accordance with the statutes of the State and the orders of the Commission at the price of 6¢ per MCF, or, upon failure to agree on a price, then at such price as might be fixed by the Commission. It offered to do all things and bear all expense required of it by the statutes of the State and the orders of the Commission, and demanded that Cities take gas from the well ratably; as, under the laws of the State and the orders of the Commission, it was its duty to do.

Cities indicated its willingness to take the gas ratably, but refused to pay the price demanded and a dispute arose

as to the price, by reason whereof the Commission has authority to fix the price, and also should fix the price to be paid for gas throughout that field by all purchasers. Ten cents per MCF measured at atmospheric pressure is a reasonable price, and would prevent the waste of gas in the field, conserve the same, and prevent its use for inferior purposes.

Cities' practice of measuring gas at 2 lbs. above atmospheric pressure results in a loss to the producers and royalty owners of more than 10 per cent of the gas purchased from them, and a corresponding loss to the State in gross production taxes, and to the Commissioners of the Land Office in royalties derived from the State's school lands.

It prayed that the Commission order Cities to connect with Peerless' well at some point designated by the Commission, and to purchase and take gas therefrom ratably with its own wells and the other wells in the field from which it is purchasing gas, at a price and under terms to be fixed by the Commission, and also that the Commission fix the price to be paid by all purchasers of gas in the Hugoton field, and for such other relief as might be proper.

The State of Oklahoma on relation of the Commissioners of the Land Office, a constitutional body having the management and control of the State's school and other public lands (Okla. Const., Art. VI, Sec. 32) intervened (171), alleging that the State owns 49,600 acres of school lands in Texas County, in which a portion of the Hugoton field is situated, and over 300,000 acres in the adjoining counties of Beaver and Cimarron, and that it has a direct interest in the cause.

It adopted the averments in Peerless' application, and alleged that when the first wells were drilled in that field there were only a few purchasers of gas therein and a limited market, and arbitrary and monopolistic prices and measurements were put into effect; that intervenor and many others similarly situated, although owners of large acreages, were not consulted as to the price or measurement, but they were fixed by the purchasers on the basis of the gas being a distress commodity; that since then a nation-wide market and a great demand for the gas has developed, and the gas is being depleted at a small fraction of its value. It alleged that there is no market at the well; and it prayed that the Commission fix a price of 10¢ per M for the gas, and require that the same be measured upon the same basis required by the Interior Department for the measurement of royalty gas upon lands of the United States or under its control.

Also, the Texas County Land and Royalty Owners Association intervened and made similar allegations.

The Response

Cities filed a response (46) in which it alleged in substance that it is engaged in producing natural gas for transportation and sale in interstate commerce through an integrated pipe line system extending from Texas into and through Oklahoma and Kansas and into Missouri and Nebraska, and has provided the necessary facilities and has acquired markets. Its business is purely private. It has never held itself out as ready or willing to serve the public generally. It has never been a common purchaser or a common carrier of gas. It has always conducted its

business under private written contracts with selected parties. It has purchased gas under exceptional circumstances and by private contracts from selected sellers solely to enable it to supply adequately its private markets. While it is not required under any valid law or regulation of Oklahoma to purchase Peerless' gas, it has offered and now offers to do so ratably, upon terms to which Peerless has refused to accede. The Commission is without power of jurisdiction to require it to take Peerless' gas or to fix a price therefor, and any statute of the State, if construed to authorize the same, is violative of the commerce clause and of the due process and equal protection clauses of the Constitution of the United States.

THE EVIDENCE

The evidence was to the following effect:

The Hugoton field covers parts of Oklahoma, Kansas and Texas. Its proven acreage in Oklahoma is approximately 1,062,000 acres (417-18). The first well therein was drilled by Wilcox Oil & Gas Company in 1924 (71-72), and it produced gas which was sold at 8 cents per MCF (99).

The entire field is one common source of supply, and gas is much more fugacious than oil (72-3). The average original pressure in the field was about 432 lbs (72). Any well drilled and operated in it will reduce the pressure in the entire field (72). During the year ending in May, 1946, the pressure was reduced 7½ lbs. (74).

Peerless has two wells in that field in Oklahoma, one in Section 5 and one in Section 8. The former was com-

pleted on February 7, 1946. Neither has been connected or is being produced, but both are capable of being so (76-7).

Gas migrates from the higher to the lower pressure areas (75). The area west of Peerless' wells is a low pressure area, the pressure gradually increasing toward the east from 370 to 420 pounds. The movement of the gas is from the Peerless tract to the west (75-6). There are only one or two wells east of the Peerless tract, and they are not being produced (75). On the other hand, Cities has wells in every section north, northwest, west and southwest of Peerless' wells, all of which are producing, while Peerless' wells are not (75). Cities is operating approximately 110 wells in that vicinity and the gas in Peerless' wells is being drained by the wells surrounding them, which drainage has already caused a pressure decline of 12½ lbs. in that area (75-6). In an area five miles square in which Peerless' wells are situated, Cities owns and is operating 14 wells, from which, up to April 1, 1946, it had produced 15,522,079 MCF of gas or an average of 620,833 MCF per section. That has caused a pressure decline in Peerless' wells of 12½ lbs. (77).

In 1945 Cities' 14 wells produced 281,031 MCF per section, and thus drained gas from Peerless' wells in Section 8 (77).

The back pressure in the wells has declined 43 lbs. (77). By dividing the whole amount of the gas produced up to a certain time by the back pressure decline in that time one can get the amount of gas produced per pound of back pressure decline, and thus determine the amount of gas remaining. That method of computing gas reserves is

called the back pressure decline method, and is the most accurate known (77). 360,979 MCF of gas were produced for each pound of back pressure decline, which shows that the future gas production down to 25 lbs. abandonment pressure for that area will be 131,396,356 MCF, or an average of 5,255,854 MCF per section. If Peerless has no outlet, its leases will be entirely drained by other wells (77-8).

The Commissioners of the Land Office own a total of 11,400 acres which is developed and on production, which, on the basis of the recoverable gas in that field, will produce 11,000,000 feet per acre over the life of the field (79).

Because of the expensive nature of gas, there can be no price without a pressure basis. The volume of gas is in proportion to the pressure. To make a comparison as to quantities and prices at different pressures, they must be reduced to a common pressure (421-2).

Atmospheric pressure in the Hugoton field is 13.2 lbs. per square inch (83; 425). Cities buys gas there at 16.45 lbs. (425) or at 3 lbs. per square inch above atmospheric pressure. Buying gas at only 2 lbs. above atmospheric pressure gives the purchaser 10.8% more gas, more heating units than he would get at atmospheric pressure (84; 427-8).

At 4 cents per MCF the loss to the State in gross production taxes alone caused by measuring gas at 2 lbs. above atmospheric pressure, instead of at atmospheric pressure, is more than $47,000.00 annually, and the loss to the producers of gas in the State is more than $942,000.00 annually (87).

The fairest pressure for the measurement of gas is that adopted and used by the United States Bureau of Mines, which is 14.75 lbs. per square inch (87). Gas in the Osage Nation, which is under the jurisdiction of the Secretary of the Interior, is measured at 10 oz. above atmospheric pressure (200; 424).

The price of gas in the field has a direct bearing upon its conservation (119-20; 281-2). It is admitted by those interested in the natural gas industry and the Commissions charged with its regulation that as the price of gas increases greater conservation is achieved (159; 163-4). As gas becomes more valuable, there is greater effort to conserve it (163). The condition in the Cement field in Oklahoma where low prices prevailed resulted in great waste of the gas, both physical and economic. A good deal of it was blown into the air (302-3).

Also, if the price for gas is too low, the producers will abandon their wells long before all the recoverable gas has been recovered, resulting in actual physical waste. Producers will not conserve gas unless they have an incentive to save it (304-5).

A multitude of valuable chemicals can be made from natural gas whereby its value can be increased forty-fold. Fischer-Tropsch gas at 10 cents will produce a barrel of gasoline at 52 cents, equivalent to coal at $1.54 per ton. The price of gas as a fuel, considering its heating value, is far below parity with other fuels (153-9). The heating value of 6,000 cubic feet of gas equals that of a barrel of oil (158). Gas in the Hugoton field is worth in excess of 10 cents per MCF at the well (101; 161-2; 283). Based on

its heating value, and without considering its convenience, the price of gas is below that of any other type of fuel (159).

Based on the current price of crude oil, and comparing its heating value with that of natural gas, the latter is worth 20 cents in the Hugoton field at the wellhead. The price of coal delivered at Coalgate, Oklahoma, and containing 11,500 btu's per lb., is $5.31 per ton. Gas in the Hugoton field contains on the average a thousand btu's per cubic foot at a pressure of 14.73. Compared with coal at Coalgate and without considering freight on the coal, gas is worth 23 cents per MCF in the Hugoton field. Compared with coal f. o. b. McAlester, having 13,500 btu's per lb. and selling at $7.35 per ton, gas in the Hugoton field is worth 27 cents per MCF. Compared with coal in the Henryetta district. which contains 13,000 btu's per lb. and sells at $5.35 per ton, gas in the Hugoton field is worth 20.3 cents (190-1).

When great gas fields have been discovered, usually by accident, there were no nearby markets for even a small portion of the gas, which resulted in a price so low as to be merely a token price (158). The major companies acquired large blocks of acreage; leaseholders and smaller operators not having financial backing and resources had no opportunity to market their gas, and the result was that prices were depressed and have remained so (162-3).

The practice of measuring gas above atmospheric pressure originated when pipe lines were leaky and for the purpose of compensating for the leakage. Now the pipe lines are welded and tight and that reason no longer

exists. The practice is merely a carry-over from the earlier days and is antiquated (166).

The Commissioners of the Land Office own in trust for the State 49,600 acres of land in the Hugoton field in Texas County. Of that, 30,160 acres are under lease, and 6,099.92 acres are producing gas at this time, and the Commissioners are receiving 4 and 5 cents per MCF for their royalty gas (182-3). They have been offered contracts providing for a price of 3.34 cents per MCF which they have refused, and as a result those wells have not been produced (183-4).

Republic Natural Gas Company pays the Commissioners royalty on the basis of 5 cents per MCF for the gas it takes.

In 1916 the price of gas at the well in the Osage Nation in Oklahoma, which is under the jurisdiction of the Secretary of the Interior, was fixed by the Secretary at 18 cents per M measured at 10 oz. above atmospheric pressure. That price has been maintained ever since, and Cities is one of the purchasers and is paying that price at the wellhead at this time (200). No gas is sold in the Osage at less than that price except that Anderson-Prichard Oil Corporation is selling gas to Cities in the Osage at 7 cents per M (201-2).

Hazel-Atlas Company at Ada is paying 11 cents per M for gas, and its officer testified before the Federal Power Commission that it could pay 30 cents and still make a profit (106-7).

Cities has made contracts with Magnolia and Stanolind Oil and Gas Company to purchase gas from them in

the Hugoton field and to pay them 6 cents per M therefor (410).

Cities has 122 wells of its own connected and producing in the Hugoton field in Oklahoma. There are approximately 240 producing wells in the field at this time (348). Cities purchases gas from 80 wells of Republic Natural Gas Company in that field and 35 wells of Skelly Oil Company (348-9). It has recently made contracts with Don Harrington, Cities Service Oil and Gas Company, and Magnolia Petroleum Company for the purchase of their gas at 6 cents per M (549). It owns 102,463.9 acres of leases in the Hugoton field in Oklahoma (400). Republic Natural Gas Company has dedicated to Cities by contract 96,000 acres in that field, and it has 56 wells connected to Cities' pipe line from which gas is being taken (401-2). Skelly has approximately 47,000 acres which are dedicated to Cities and 38 wells thereon are connected. Those contracts provide that all of the acreage is dedicated to Cities for the life of the leases (402).

Peerless has over 100,000 acres of leases and is the only one whose wells are unconnected (405). If Cities has Harrington & Marsh under an acreage dedication, then it has the greater part of the field not owned by pipe line companies (406). Its contract with Harrington & Marsh covers 19 wells and gives the right to connect with such other wells as it sees fit from time to time. Harrington & Marsh have about 75,000 acres of leases (407). Cities is purchasing from only three producers in that field but it purchases from about 50 producers in the State (410). Out of 300 wells in the entire field, Cities is connected to 236 (409).

Cities sells gas from the Hugoton field to Consolidated Gas Company at Blackwell, Oklahoma, for distribution for light, heat and power purposes in Blackwell and Tonkawa. It also sells gas to Kay County Gas Company, which supplies Ponca City, Newkirk and other towns in Oklahoma. It also sells gas from the Hugoton field for light, heat and power purposes to other places in Oklahoma (411-12).

Peerless tendered its gas to Cities at 6 cents per MCF (417). Stanolind's and Magnolia's gas which Cities has contracted to purchase at 6 cents, is in the Hugoton field (419).

Cities Service *Oil* Company, an affiliate of Cities, has a processing plant in the Hugoton field in which it removes from the natural gas the gasoline and other hydrocarbons, and the greater part of the gas which Cities takes out of that field is run through that processing plant The product taken out is valuable and salable (461-3).

Empire Gas and Fuel Company, the name of which was later changed to Cities Service Gas Company, bought the properties of Kansas Natural Gas Company, Marnett Mining Company, Wichita Natural Gas Company and Wichita Pipe Line Company in 1922. Empire Gas and Fuel Company was not previously doing business in Oklahoma, and had not qualified (415-16). It qualified in the State on April 19, 1922. Later it was reorganized under the name of Cities Service Gas Company and the latter qualified on August 3, 1927. Cities admits that since that date it has had a permit from the State to do business therein, and has been buying and selling gas for light,

heat and power purposes, but denies that it has done so "under that permit" (210-11).

During the hearing Cities entered into a written stipulation with Peerless to take gas from the latter's wells without prejudice to the final determination of the cause as to measurement and price (211).

The Orders
(11; 19)

In its orders the Commission found in substance as follows:

The Hugoton field is one common source of supply of gas. There are approximately 300 wells therein some of which are not connected to pipe lines and therefore are not producing. The original pressure in the field was 448 lbs., but has now been reduced to 400 pounds. The total reserves are about seven trillion cubic feet (par. 4).

Peerless is the owner of leases covering approximately 110,000 acres, on which it has drilled two wells (par. 5). Cities is the owner of various gas wells from which it is and has been taking gas from the same reservoir into which Peerless wells have been drilled (par. 7), and is engaged in the transportation of gas for compensation, hire and otherwise from that common source of supply (par. 8).

The production of gas in that field is in excess of market demand (par. 9).

Cities is engaged in buying and selling gas in that field and in other places in the State of Oklahoma, and is a

common purchaser thereof within the meaning of the State's statutes. It purchases gas from more than 50 persons, firms and corporations in the State (par. 10).

It is using the highways of the State for the purpose of laying gas pipe lines and transporting gas, and is in fact a common carrier of natural gas (pars. 12 and 13).

It is engaged in taking gas from the Hugoton field for purposes other than the development of a gas or oil field, or operating oil wells, or for its own domestic use (par. 14).

It produces and purchases gas in Oklahoma and transports and sells the same both directly and indirectly to the public for light, heat and power (par. 15).

It maintains and operates pipe lines for the transportation of gas in and from the Hugoton field, one of which lines is in close proximity to Peerless' wells involved herein (par. 16).

It qualified to do business in Oklahoma after the passage of the acts invoked here which fixed its duties and obligations, and thereby accepted and agreed to comply with the same (par. 17). It qualified with knowledge of the laws of the State relating to natural gas and the taking thereof, and was thereafter a party in the case of *Oklahoma Natural Gas Company* v. *State*, 161 Okla. 104, 17 Pac. (2d) 488, which required ratable taking of gas under an order similar to that sought in the instant case. Its operations constitute it a transporter of natural gas (pars. 17, 18 and 19).

A dispute has arisen between Peerless and Cities as to the price, measurement and terms of the latter's taking

of gas from the former's wells producing from the same common source of supply. Prior to the filing of this proceeding Peerless made a tender of the gas from its wells to Cities, and the latter signified its willingness to take the same, but refused to pay therefor more than 4 cents per MCF, measured at a pressure of 2 lbs. above atmospheric, and it refused to take the gas at all unless Peerless would dedicate to it the gas from all its leases in that field for the life of the leases, and the dispute as to the price, measurement and terms of taking arose as a result thereof (pars. 20 and 21).

Cities continued to refuse to take gas from Peerless, unless Peerless would dedicate to it the gas from all its acreage in the field at a price of 4 cents per MCF for the life of the leases, until long after the filing of this application, when Peerless and Cities agreed that said well should be connected to Cities' pipe line, and that the latter would take gas therefrom, that Cities would make payment upon the purchase price at 4 cents per MCF plus ½ cent for gathering and delivering charges, or a total of 4½ cents per MCF delivered into Cities' pipe lines, without prejudice to a final determination of this controversy as to measurement and price, and that in the event a higher price or a different measurement should be finally fixed and upheld, Cities would pay to Peerless the difference between the amount previously paid and the price as fixed by the Commission, all as evidenced by their stipulation on file herein (pars. 22 and 32).

The corporations operating pipe lines and transporting gas out of the Hugoton field own or control the greater portion of the leases in said field, and control all the out-

lets for the gas produced, and have been able to dictate and have dictated the price, measurement and terms of the taking, and the producers without a connection have been required to accept the same or close their wells (pars. 23 and 33). There is no competitive market for gas in the Hugoton field, it having been stifled by the control of acreage and markets by the pipe line operators therein, and as a result gas is being taken out of the field at a price for less than its value for heating and other purposes as compared to the value of other fuels, and a great resource of the State is being depleted at a price far less than its value (pars. 24 and 34; and 25 and 35).

Cities purchses gas in that field under contracts containing different terms and conditions, as evidenced by its contract with Skelly Oil Company, its contract with Republic Natural and its contract with Hagy, Harrington & Marsh (pars. 27 and 37).

Cities' operations constitute it a common carrier and a common purchaser of gas and a public utility (pars. 28, 29, 30 and 31; 39, 40, 41 and 42).

The taking of gas from said field at the prices and under the terms and measurements now prevailing, results in and causes both economic and physical waste of gas, loss to producers and royalty owners, loss to the State in gross production taxes, inequitable taking of gas from the common source of supply, and discrimination against various producers in the field (pars. 32 and 44). The Commission has authority to and should fix a minimum price and terms for the taking of natural gas in said field, and it does so for the purpose of preventing waste of the gas, both economic and physical, and for the purpose of pro-

tecting the correlative rights of the producers (pars. 33 and 34; 45, 46 and 47).

"It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That the respondent Cities Service Gas Company be and it is hereby required to take natural gas ratably from applicant's well located in Section 8, Township 4 North, Range 16 ECM, Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission.

"2. That the respondent Cities Service Gas Company be and it is hereby required to take natural gas ratably from applicant's well located in Section 5, Township 4 North, Range 16 ECM, Texas County, Oklahoma, in accordance with the formula for ratable taking prescribed in order No. 17867 of this Commission.

"3. That respondent shall pay to applicant for the natural gas so taken not less than 7 cents per M cubic feet of natural gas at the wellhead measured at a pressure of 14.65 lbs. absolute per square inch.

"4. That no natural gas shall be taken out of the producing structures or formations in the Guymon Hugoton field in Texas County, Oklahoma, for a price at the wellhead of less than 7 cents per M cubic feet of natural gas measured at a pressure of 14.65 lbs. absolute per square inch.

"5. This order shall be effective as of January 1, 1947."

Upon appeal those orders were held valid by the State Supreme Court. The decision has not yet been officially reported, but may be found in 220 Pac. (2d) 279.

ARGUMENT AND AUTHORITIES

I.

The Statutes Involved

Two of the statutes involved were passed in 1913 (Okla. Sess. L. 1913, pp. 166 and 439), the pertinent provisions of which are now contained in Okla. Stat. 1941, Title 52, Sections 23-5 and 231-3. Another was enacted in 1915 (Okla. Sess. L. 1915, p. 398), and its relevant provisions are found in Okla. Stat. 1941, Title 52, Sections 239 and 240. They are set forth in the Appendices.

The 1913 Acts are so explicit as not to need interpretation. They declare that gas underlying any land is the property of the landowner or his lessee; that they may take gas from a common source proportionately to the natural flow of their wells, and that the drilling of a well by an owner or lessee shall be regarded as reducing to possession his share of the gas. And they provide that any person taking gas from the field, except for the development of a gas or oil field, operating oil wells, or for his own domestic use, shall take ratably from each owner in proportion to his interest, upon such terms as may be agreed upon, or, if they cannot agree, then at such price and upon such terms as may be fixed by the Commission after notice and hearing (Appendices A and B).

They explicitly authorize the order requiring Cities to take gas from Peerless ratably and fixing the price therefor.

The Oklahoma Supreme Court on appeal construed the 1915 Act (Appendix C) as going further, and as au-

thorizing the Commission, for the prevention of waste, both physical and economic, the protection of the correlative rights of owners and producers, and for the general welfare, to fix a minimum price and the basis of measurement of gas in the field and to prohibit its taking at a lesser price.

That decision is binding upon this Court as to the meaning and intent of those acts and their accordance with the State's Constitution (*Hicklin* v. *Coney*, 290 U. S. 169, 172; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Railroad Commission*, 283 U. S. 380; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; *Williams* v. *Kaiser*, 323 U. S. 471; *Oklahoma Tax Commission* v. *Texas Company*, 336 U. S. 342; *Terrace et al.* v. *Thompson*, 263 U. S. 197, 224; *Georgia Ry. & Electric Co.* v. *City of Decatur*, 295 U. S. 165; *Rasmussen* v. *State of Idaho*, 181 U. S. 198; *Lehman* v. *State Board of Public Accountancy*, 263 U. S. 394; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Smiley* v. *State of Kansas*, 196 U. S. 447).

It follows, therefore, that this Court will take those statutes as intending to confer the power which the Commission exercised, and as not violating any provision of the State's Constitution; and this Court's sole function is to determine whether the statutes so construed and the orders made under them are violative of the Federal Constitution in the respects alleged.

Appellant denies that. It asserts that this Court may reverse a state court's construction of a state statute if this Court would construe it differently—that a state court's erroneous construction of a local statute in and

of itself constitutes a violation of the Federal Constitution, although the statute would be valid if it in fact means what the state court held it to mean. And it says that the Oklahoma Court's holding that the provisions in the statutes conferring upon the Commission power to require ratable taking and "equitable purchasing" authorized it to require appellant to take Peerless' gas ratably and to fix the price therefor is erroneous, and, because it is erroneous, is violative of the Federal Constitution, although the statutes themselves would not be so if they expressly granted that power.

Of course, that is not true. This Court takes the law of the State to be what the highest State Court declares it to be, whether that law be statutory or the common law of the State; and its function is only to determine whether the law so declared violates the Federal Constitution.

The authorities which appellant cites do not support its position. They go only to the proposition that where a state court decides a case involving a federal question upon a non-federal ground, this Court will examine the non-federal ground asserted to ascertain whether it is sufficiently substantial to warrant disregard of the federal question, and whether the decision upon it was arbitrarily made for the purpose of evading the federal question.

This case presents no such situation. The constitutional questions involved were met squarely and determined. Appellant contended, not only that the statutes did not confer the power upon the Commission, which was solely a question of state law, but that, if they did so, they and the order made under them were unconstitutional

and void; and the State Court held that the statutes did confer the power, and that they and the order were constitutional and valid. There was no evasion of the constitutional questions.

II.

By entering the state and there engaging in the business of buying and holding gas leases, drilling and operating gas wells, and purchasi gas, all after the enactment of the statutes which conditioned its right to do that business in the state, appellant accepted the terms and provisions of those statutes, and is therefore barred from questioning their constitutionality.

Appellant is a foreign corporation. Oklahoma had the right for any reason or without reason to prohibit it from doing any but an interstate business therein (*Asbury Hospital* v. *Cass County*, 326 U. S. 207; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562; *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494; *St. Clair* v. *Cox*, 106 U. S. 350; *Hemphill* v. *Orloff*, 277 U. S. 537; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *State of Washington ex rel.* v. *Superior Court*, 289 U. S. 361), or to prescribe the conditions upon which it could do so (*Lincoln Nat. Life Ins. Co.* v. *Read*, 325 U. S. 673; *Horn Silver Min. Co.* v. *New York State*, 143 U. S. 305; *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Paul* v. *Virginia*, 8 Wall. 168; *Hanover Fire Ins. Co.* v. *Carr, supra*; *LaFayette Ins. Co.* v. *French*, 59 U. S. 404; *St. Clair* v. *Cox, supra*; *Orient Ins. Co.* v. *Daggs, supra*; *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22).

As to appellant and its intrastate business, Oklahoma prescribed those conditions in 1913 and 1915. Seven years

after the enactment of the latter Act, Empire Gas & Fuel Company, which is now Cities, entered the State, obtained a permit, and commenced the business of acquiring, holding and drilling gas leases, producing gas, and purchasing gas from others.

That constituted an acceptance of the conditions upon which that privilege was granted, and appellant is exercising the privilege today. It has acquired and owns leases upon large tracts of land in the Hugoton field and in other fields of the State. It has drilled and is drilling wells thereon, has produced and is producing gas therefrom, and has purchased and is purchasing gas from others, all being acts which the State had the right to forbid appellant to do, or to prescribe the conditions upon which it could do them.

In *The Pipe Line* cases, 234 U. S. 548, this Court held that the Hepburn Act, though not compelling existing corporations engaged in interstate transportation of oil to continue in operation, nevertheless forbade them to continue to transport oil purchased by them from others except as common carriers; and as to pipe lines constructed after the passage of that Act, the Court said, "So far as the statute contemplates *future pipe lines and prescribes conditions upon which they may be established, there can be no doubt that it is valid.*"

Also, in *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, this Court said:

> "By accepting the privilege it (appellant) voluntarily consented to be bound by the conditions attached to it, and, while enjoying the benefits of that

privilege it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional."

That holding has been cited and followed in many cases. See *United States* v. *Traugott Schmidt & Sons* (DC), 2 Fed. (2d) 290; *Dunn* v. *Fort Bend County et al.* (DC), 17 Fed. (2d) 329; *Eichholz* v. *Hargus et al.* (DC), 23 Fed. Supp. 587; *Valvoline Oil Co.* v. *United States*, 25 Fed. Supp. 460; *Henderson* v. *Twin Falls County*, 59 Idaho 119, 80 Pac. (2d) 801, 810; *Byard* v. *Commissioner of Taxation*, 209 Minn. 219, 296 N. W. 10; *Louisiana Ry. & Nav. Co.* v. *State* (Tex. Civ. App.), 298 S. W. 462, 467; *Assessment of Champlin Refining Co.*, 129 Okla. 166; *Fitzsimmons* v. *Rauch*, 195 Okla. 529, 532.

If appellant had expressly contracted with the State that, in consideration of its admission, it would conform to those statutes, unquestionably it could not attack their validity. An implied contract, however, is equally binding, and appellant's acceptance and exercise of the privileges granted upon the conditions embodied in the statutes constituted such implied contract and effectually estops it.

That means that appellant cannot question the constitutionality of the acts declaring it a common purchaser of gas, requiring it to purchase ratably, and authorizing the Commission to fix the price therefor.

Of course, if the Commission, in requiring appellant to purchase ratably, had fixed the price so high as to entail loss upon it or prevent it from making a profit, it would not be precluded by its acceptance of the statutes from asserting that the order deprives it of property without

due process, any more than a public utility, under an admitted duty to serve and whose rates are subject to regulation, is precluded from attacking a rate fixed as confiscatory.

III.

Neither the statutes nor the orders violate the 14th Amendment.

In General

In addition to the acceptance and estoppel just mentioned, it is settled that the states have power to prohibit the waste of their natural resources, including natural gas, oil and water, and power to protect the correlative rights of their owners (*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Hunter Co., Inc.* v. *McHugh, Commissioner*, 320 U. S. 222; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Henderson Co.* v. *Thompson*, 300 U. S. 258; *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376).

Also, in so doing, the states may take into consideration not only individual interests, but also the effect upon their own economies (*Railroad Commission* v. *Rowan & Nichols Oil Corp.*, 310 U. S. 573).

Since Oklahoma has those powers, it has power to adopt whatever reasonable means are necessary to effectuate them. If necessary to that end, it has power to prevent

a producer having a pipe line and a market from draining and selling the gas from the leases of adjacent owners by requiring him either to abstain from producing or to purchase the others' gas ratably at a price to be fixed by the Commission, an impartial body, after a hearing safeguarded by the right of judicial review by its Supreme Court and ultimately by this Court.

The fact that the only alternative to ratable taking and purchasing by a producer engaged in taking and purchasing is to close his own wells and cease to purchase, does not render the statute void. In *Walls* v. *Midland Carbon Co., supra,* it was contended that enforcement of the statute would prevent the producer from taking and using its gas and destroy a large investment; but it was held that that fact did not invalidate the statute. This Court said that "the determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, * * * which the state has an interest to adjust and preserve, natural gas being one of the resources of the state; and in this case it is more important to consider, not for what a particular owner uses the gas, but the proportion of that use to others, or it may be the prevention of use by others."

In *The Pipe Line cases,* 234 U. S. 548, it was held that the only alternative to compliance with the statute was for the pipe line companies to cease their business, but that nevertheless the statute was valid.

In *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, it was contended that enforcement of the statute against the waste

of gas would prevent the production of oil and destroy the company's business, but this Court said that the contention went "not to the power to make the regulations but to their wisdom", and that notwithstanding the facts alleged, the act was valid.

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, the statute forbade the use of pumps to bring to the surface water charged with gas, and the company alleged that the water could be so brought only by pumps, and that the enforcement of the act would wholly prevent it from obtaining the water; but a demurrer to the company's bill, which admitted the facts alleged, was sustained, and this Court held the statute valid.

In *Bacon* v. *Walker*, 204 U. S. 311, this Court said that, where the power of regulation exists the imposition of some limit to a right, when its exercise will impinge upon the equal right of another, is the exercise of legislative power, and the circumstances which induce it can not be pronounced illegal "on surmise or on the barren letter of the statute"; and that where equal rights exist the state has an interest in their accommodation. "A state may consider the relation of rights and accommodate their coexistence, and in the interest of the community, limit one that others may be enjoyed" (*Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 315). See also *Henderson Co.* v. *Thompson*, 300 U. S. 258.

Natural gas is a valuable resource of the state. Of all known fuels it is the cheapest, the most convenient to use, and the most satisfactory. It has twice the heating units of manufactured or artificial gas. It cannot be

created by man, and, when used or wasted, is gone forever. Already untold trillions of cubic feet have been irretrievely lost. The state therefore has a legitimate interest in the conservation of the remainder, both from the standpoint of its inhabitants and their welfare and from that of its own revenues derived from production taxes thereon. It derives no revenue from the gas that is wasted.

It is next to impossible to enforce conservation of gas without giving its owners an incentive to conserve it. If it is to be saved, it must be made worth saving. An owner who has and can obtain no market for his gas, or who can obtain only a pittance for it, naturally will consider and treat it as valueless, and will expend neither money nor effort to save it.

Also, when the price is too low, owners sell their flush production for what they can get, but when the pressure and volume decline they plug and abandon their wells and retrieve their casing and equipment long before all the recoverable gas has been recovered, thus leaving in the ground large quantities that can never thereafter be recovered. The matter of price, therefore, is inextricably linked with conservation, and the ridiculously low price being paid for gas in the Hugoton field constitutes not only an economic waste of one of the State's natural resources, but is also conducive to its actual physical waste.

A gas pool usually underlies the lands of several owners, and it does so in this case. While the surface is divisible by property lines, the pool is indivisible, and is owned in common by the surface owners. An owner may

fence his surface and prevent trespass thereon, but he cannot fence in the gas that underlies it; and every thousand cubic feet taken from the pool diminishes the quantity in the pool that much and the quantity underlying the land of each owner proportionately. The result is that an adjacent producer who has a pipe line and a market has the physical power to take from the pool and appropriate not only the gas underlying his land but also that underlying his neighbor's land. In this case appellant was doing that; and the question is whether the State is constitutionally powerless to prevent its doing so without making compensation to its neighbor.

The surface owners are the owners in common of the gas pool underlying their lands. If they were not so at common law, there is nothing in the constitution which prevents the Legislature from making them so, from declaring the legal effect of the situation, and protecting the co-equal rights of the owners. Oklahoma has done so. Section 231, Okla. Stat. 1941 (Appendix A), enacted in 1913, provides:

> "All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners or gas lessees of the surface under which the gas is located in its original state."

That accords with our sense of morality and justice. If a landowner should be denied protection of the property right which it creates or declares, it would be, not because he is without right, but because the injury is one for which the law affords no remedy. But, if the right exists, then it is competent for the State to furnish a remedy.

Oklahoma's Constitution (Art. II, Sec. 6) provides that speedy and certain remedy shall be "afforded for every wrong and for every injury to person, property or reputation."

A person does not have and cannot constitutionally be granted the right to appropriate his neighbor's property without compensation because it is necessary to appropriate it in order to utilize his own. The several surface owners own the underlying gas pool in common. But a tenant in common who appropriates or uses the common property is required to account to his co-owners in proportion to their interest in it.

If the State could accomplish its purpose to conserve natural gas and protect the correlative rights of owners by some other means less drastic, possibly it would be its duty to adopt such means rather than to prevent a producer who has a pipe line and a market from producing his wells without ratably purchasing gas from the adjacent leases; but there are no other means. The question has engaged the best thought of the legislatures of the gas producing states, without success, in evolving an effective remedy that is less drastic. In *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579, this Court said that the protection of the co-equal rights of producers of oil in the same field "is as thorny a problem as has challenged the ingenuity and wisdom of legislatures." But, because gas is more fugacious than oil and cannot be stored outside its natural reservoir as oil can the problem as to it is even more difficult. There is no alternative. The State must either require what the Oklahoma Supreme

Court holds that the acts in question require, or else must permit a producer who is so fortunate as to have a pipe line and a market to appropriate his neighbor's gas without compensation.

If, as held in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, the state may constitutionally require banks to contribute to a fund to pay debts of a failing rival in business, then Cities' plea of unconstitutionality fails. The Act is a police measure as to which the state has broad powers, and it is reasonably adapted to the ends sought to be achieved. Also, at other times and places the same law may be beneficial to Cities, and the ultimate benefit to it may balance its burden. As said in the *Noble State Bank* case, "The share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

There is no question that appellant is a common purchaser under the statute. The evidence showed that it purchases from several producers in the Hugoton field; it purchases in the Osage Nation; and its own witnesses testified that it purchases from more than fifty producers in the State. It came into the State and obtained a permit under two statutes, one of which provided that any person taking gas from a gas field shall take ratably from each owner of the gas in proportion to his interest therein (Appendix A, Sec. 233), and the other, that every corporation then or thereafter engaged in the business of purchasing natural gas shall be a common purchaser thereof and shall purchase all the gas in the vicinity of its pipe line ratably and without discrimination in favor of its own production (Appendix B, Sec. 23).

Appellant's character is to be determined by the statutes under which it was admitted to do business and by the business it does. It says that it purchases only by private contract and from selected sellers. In *Terminal Taxicab Co., Inc. v. Kutz et al.*, 241 U. S. 252, the taxicab company made the same contention. Its charter even provided that it should not be or exercise any of the powers of a public service corporation. But this Court held that its character was to be determined by what it did, and that the fact that it carried passengers only under contracts with the owners of the Union Railway Station and of hotels in Washington did not prevent it from being a common carrier, and that it was subject to regulation as such by the Public Utilities Commission of the District of Columbia. Practically all common carriers and public utilities enter into contracts with their patrons. Railroads issue bills of lading and tickets which are contracts, and water, gas and electric companies require contracts. But admittedly they are public service corporations.

The question, therefore, comes to this: Does a state law which forbids a producer of gas who is so fortunate as to have a pipe line and a market from draining and selling his neighbor's gas except upon the condition that he take it ratably and pay for it at a price to be fixed by an impartial body, whose decision is subject to review by the State Supreme Court and by this Court, violate the 14th Amendment? Certainly it does not.

The laws in question are within the police power of the state. They only require appellant to so use its own as not to injure others or the State. Appellant's intrastate

business is affected with a public interest. In *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, it was held that such an interest can exist in a business distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved therein. It held that a business by circumstance and its nature may rise from private to public concern, and consequently become subject to governmental regulation in its rates, prices and practices. See also *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Munn* v. *Illinois,* 94 U. S. 113, and *Nebbia* v. *New York,* 291 U. S. 502, 531-37.

In the exercise of its police power, a state may forbid as inimical to public welfare the prosecution of a particular type of business or regulate it in such manner as to abate evils deemed to arise from its pursuit (*Great Atlantic and Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412). Its regulations may be designed to promote the public convenience or the general prosperity as well as the public health, morals or safety (*Chicago, B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561). In the exercise of that power, the state has wide discretion in determining its own public policy and what measures are necessary to effectuate them (*Terrace* v. *Thompson,* 263 U. S. 197). Where the public interest is involved preferment of that interest over individual property interests is a characteristic of the police power (*Miller* v. *Schoene,* 276 U. S. 272). Considerations of financial loss or of so-called vested rights in private property are insufficient to outweight the necessity for legitimate exercise of the police power (*Hadacheck* v. *Sebastian,* 239 U. S. 394; *Rein-*

man v. *City of Little Rock*, 237 U. S. 171; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Atlantic Coast Line Ry. Co.* v. *City of Goldsborough*, 232 U. S. 548; *Chicago & A. Ry. Co.* v. *Tranbarger*, 238 U. S. 67; *Standard Oil Co.* v. *City of Tallahassee* [5 C. C. A.], 183 Fed. [2d] 410, 413).

In *Nebbia* v. *New York*, 291 U. S. 502, 537, in which a commission pursuant to a state statute had fixed the price of milk, this Court, speaking of the police power, said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent

with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

If a state has power to prescribe drilling units, to require the combination of smaller units into a drilling unit, to apportion to each owner his fair share of the cost of the well and of the production therefrom, and to prevent the owners from drilling separate wells on their tracts (*Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376), then certainly it has power to require a producer having a pipe line and a market to purchase the gas which it drains from its neighbors' wells and to pay a reasonable price therefor.

The dissenting opinion of the late JUSTICE RUTLEDGE, concurred in by JUSTICES BLACK, MURPHY and BURTON, in the similar case of *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, answers appellants' contentions, and no contrary opinion on the merits was expressed by any Justice. The majority held only that, because no price for the gas had been fixed, the judgment of the State Court lacked the finality necessary to its review here. The dissenting Justices were of opinion that, since the order required Republic to commence taking gas at once, the question on the merits was not unrelated to that of finality. Because that opinion says what we wish to say, and more clearly and forcibly than we can say it, and is as easily read here as in the report, we may be pardoned for quoting from it at length. The learned Justice stated the question on the merits as follows (p. 89):

> "The question as cast in legal terms is whether the due process and equal protection clauses of the Fourteenth Amendment deny Oklahoma the power to give one private producer from a common pool the option

to shut down production altogether or to purchase gas from another for the purpose of adjusting their correlative rights in the pool, when that is the only practical or feasible alternative consistent with production by both to protect the latter from drainage by the former.

"Republic denies the state's power to do this. Its basic position is that it has a federal constitutional right to drain off all the gas in the field, unless other owners of producing rights can supply their own facilities for marketing their production, regardless of varying conditions in different competitive situations and regardless of all consequent practical considerations affecting feasibility of furnishing such facilities."

And he held that Republic had no such right, saying:

"The basic question here is really one of substantive due process. It relates primarily to whether Oklahoma can curtail the unqualified right of capture which appellant conceives it acquired by virtue of and as an unalterable incident to its acquisition of surface rights including the right to drill for gas. For, in denying that the state can enforce the only feasible method of limitation consistent with production by Peerless, Republic in effect is saying that the state cannot restrict its right to take all gas in the common reservoir, including all that can be drained from beneath Peerless' lease and the lands of other owners similarly situated. This is, for the particular circumstances, a denial of the state's power to protect correlative rights in the field or to regulate appellant's taking in the interest of others having equal rights proportionate to their surface holdings. For, though Republic concedes it is bound by Oklahoma's statutory requirement of pro rata production, that requirement becomes merely a time factor affecting the rate

and length of the period of Republic's drainage, not the total quantity eventually to be taken, if Republic can defy the commission's order and thus leave Peerless in its present helpless condition.

"The contention is bold and far reaching, more especially when account is taken of the nature of the industry. Natural gas in place is volatile and fugitive, once a single outlet is opened. When extracted it cannot be stored in quantity, but must be marketed ultimately at burner tips in the time necessary for conveyance to them from the well mouth. The competitive struggle for the industry's rewards is particularly intense in the initial stage of developing a field. By the industry's very nature large outlays of capital are required for successful continuing production and marketing. All those factors however tend toward monopoly once success has been achieved in a particular field.

"These peculiar qualities, moreover, have been reflected in the legal rights relating to the ownership of gas in place, as well as its extraction. They have been adapted to its nature and to that of the competitive struggle regarding it."

Further on, he said:

"In accordance with Oklahoma's law, appellant does not assert title to the gas in place. It asserts only the right to capture what it can produce. But that right, unqualified, would include the right to take gas from beneath others' lands. So taken, it defies their rights to a proportionate share and the state's power to secure them, if for reasons rendering marketing through their own facilities unfeasible they cannot join in the unrestrained competitive draining.

"So far as the federal Constitution is concerned, there is no such unrestricted fee simple in the right

to drain gas from beneath an adjacent owner's land. It is far too late, if it ever was otherwise, to urge that the states are impotent to restrict this unfettered race or to put it upon terms of proportionate equality by whatever measures may be reasonably necessary to that end. Indeed our constitutional history is replete with instances where the states have altered and restricted schemes of property rights in response to the public interest and the states' local needs."

In note 31, on page 95, he said:

"Under certain circumstances a state may compel one individual to surrender private property solely to enable another to exploit the potential resources of his private property. Thus in *Clark* v. *Nash*, 198 U. S. 361, the plaintiff's land could be made productive only by enlarging an irrigation ditch across defendant's land, and in *Strickley* v. *Highland Boy Gold Mining Company*, 200 U. S. 527, the mining company could deliver its ore to market only by constructing an aerial bucket line across defendant's land. Here Peerless can exploit its property only if Republic is compelled to take its gas to market. Moreover, until Peerless is able to produce the gas under its land, this gas will continue to be withdrawn by Republic. In effect Republic is now exploiting Peerless' property."

He then said:

"The remaining narrow issue is whether the most practical method of achieving a fair accommodation of the correlative rights of the parties is invalid because Republic is required to take and to pay for gas that it does not want—at least does not want if it must pay for it.

"Appellant relies heavily on *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, where this Court in-

validated an order limiting respondent's production so severely that it would have had to purchase gas from unconnected wells in its vicinity in order to satisfy its commitments. Thus the necessary effect of that order was comparable to the effect of the order under review here.

"But there is a crucial difference between the cases. In deciding the *Thompson* case the Court explicitly assumed that the order could be upheld if reasonably designed either to prevent waste or 'to prevent undue drainage of gas from the reserves of well owners lacking pipe line connections.' Because of a geological anomaly there was a general drainage in the gas field away from the connected wells toward the unconnected wells, 300 U. S. at 71-73, so that the producing wells, rather than draining gas away from the dormant wells, would only reduce their own loss by producing as much as possible. Therefore the limitation on their production could not be justified, since it was neither for the purpose of preventing waste nor a reasonable regulation of correlative rights. Instead of protecting one party from loss, it operated to aggravate the effect of the drainage away from the owners of connected wells. They suffered, not only by an increased drainage loss, but also by the consequence that they were forced to share their facilities and market with the very parties who profited by their loss. The Court held that such an order requiring one company to share its market with another was unconstitutional inasmuch as it was not justified either as a conservation measure or as a reasonable adjustment of correlative rights. The latter justification is present in this case.

"The fact that Republic is compelled either to purchase Peerless' gas or to carry it to market and account for the profits does not make the regulation unrea-

sonable. If that were the sole cause for complaint, the state could take the more drastic step of requiring all the well owners to shut down completely until all were able to produce on a ratable basis or come to some agreement effective to make this possible. It is clearly within the state's power to require Republic to compensate Peerless for the gas drained from under the *Peerless* land. *Patterson* v. *Stanolind Co.*, 305 U. S. 476. Here, instead of requiring Republic to make a cash payment based on the estimated amount of drainage, the commission has selected what is unquestionably a more accurate method of adjusting the correlative rights. Even if it could be assumed that this method imposed a somewhat heavier burden on Republic than possible alternatives, it does not follow that the method selected by the commission is unconstitutional. For we have constantly recognized the propriety of allowing wide discretion to the administrative agencies who are best qualified to select the most reasonable resolutions to the thorny problems that accompany regulation in this highly technical field. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573. Keeping in mind the fact that property law is peculiarly a matter of local concern, the special difficulty of defining and regulating property rights in natural gas, the respect due to experts in this field, and the rather unusual facts this record presents, I cannot say that the state is without power to enter this order."

Noticing the distinction there pointed out between that case and *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, namely, that in the latter "there was a general drainage in the gas field away from the connected wells toward the unconnected wells (300 U. S. 71, 73) so that the producing wells, rather than draining gas away from the dormant

wells, would only reduce their own loss by producing as much as possible", the situation here is exactly the reverse. The evidence, without dispute, showed that gas migrates from high to low pressure areas, that Peerless' wells are in the higher and appellant's in the lower pressure areas, and that that accelerated and intensified appellant's drainage of Peerless' wells (75-76).

The statutes and orders in their general purpose and effect are not unconstitutional.

IV.

Appellant's Particular Contentions

(a) The statutes and the orders are not so vague or uncertain as to constitute a denial of due process.

The 1913 Acts, pursuant to which the order against Cities by name was made, are explicit. They declare that the natural gas under any land is the property of the landowner or his lessee, and that any person taking gas from a common source shall take ratably from each owner upon such terms as may be agreed upon, or, if they cannot agree, then at such price and upon such terms as may be fixed by the Commission (Appendix A). They further declare that every corporation engaged in purchasing natural gas shall be a common purchaser, and shall purchase all the natural gas in the vicinity of its pipe line ratably and without discrimination (Appendix B). And the order (No. 19515) requires that appellant take gas ratably from Peerless, and pay therefor 7 cents per MCF measured at a pressure of 14.65 lbs. It is difficult to conceive how the statute or order could be more explicit.

The 1915 Act (Appendix C) provides that whenever the full production from any common source exceeds the market demand, then any person having the right to produce therefrom may take only such proportion of the gas that may be marketed without waste as the natural flow of his wells bears to the total natural flow of such common source of supply, having regard to the acreage drained by each well, so as to prevent such person from obtaining an unfair proportion of the gas. And it provides that every person engaged in purchasing gas in the State shall be a common purchaser, and shall purchase ratably and without discrimination; and that the Commission shall have authority to make regulations for the equitable purchasing and taking of all such gas. The Supreme Court held that the Commission's power to make regulations for the equitable purchasing and taking of all such gas included the power to fix the price therefor. That statute, as construed by the Supreme Court, is not vague, indefinite or uncertain.

Nor is the general order prohibiting the taking of gas from the field at a price less than 7 cents per MCF, as interpreted and clarified by the Commission in Order No. 19702 (853), made upon Phillips' application, vague or uncertain.

The latter order interpreted the general order as fixing the price of gas sold in the field at 7 cents per MCF, and as requiring that gas taken from the field but not sold therein be so utilized as to bring the producer the equivalent of not less than 7 cents per M therefor. Those statutes and orders as thus construed and interpreted are not vague

or uncertain (*Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okla. 155, 305 U. S. 376, 379; *Mutual Film Corp.* v. *Industrial Commission*, 236 U. S. 230; *Gundling* v. *Chicago*, 177 U. S. 183; *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U. S. 380; *Mahler* v. *Eby*, 264 U. S. 32; *Federal Radio Commission* v. *Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266; *Bowles* v. *Willingham*, 321 U. S. 503; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8).

Furthermore, the orders were not retroactive. They did not affect past transaction. They were made on December 9, 1946, and were not to become effective until January 1, 1947.

(b) The assignment that the findings purporting to support the order are contrary to the evidence in that no waste of gas was being committed, that correlative rights of owners and producers were being protected and conservation was being observed, and that the orders were therefore arbitrary, discriminatory and irrelevant to any policy the state was free to adopt, is not correct.

The findings were sufficient to support the order, and they were based upon competent evidence.

If there was no physical waste of gas in the field, it was because the producers who had no outlet did not blow their gas into the air but kept their wells closed while appellant drained away and appropriated their gas.

The statement that correlative rights of owners were being protected is simply not true. Appellant's refusal to take their gas, except under contracts for the life of the

leases and at a non-competitive price fixed by it, with the alternative of suffering the drainage of their leases, did not constitute the protection of their correlative rights, and therefore the order was not arbitrary, and was not irrelevant to the State's policy of protecting the correlative rights of owners and lessees.

As JUSTICE RUTLEDGE said in *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62, 89, appellant's contention is "that it has a Federal Constitutional right to drain off all the gas in the field, unless other owners of producing rights can supply their own facilities for marketing their production, regardless of varying conditions in different competitive situations and regardless of all consequent practical considerations affecting feasibility of furnishing such facilities"; and again that it "in effect is saying that the State cannot restrict its right to take all gas in the common reservoir, including all that can be drained from beneath Peerless' lease and the lands of other owners similarly situated" (p. 91). And he said that appellant "has no such right."

All that appellant can mean by its statement that there was no waste of gas and that conservation was being observed is merely that gas was not being blown into the air. In the face of the undisputed evidence it cannot mean that it was not draining Peerless' gas and appropriating it without compensation, which was a violation of Peerless' correlative right.

(c) The fact that the orders are applicable only in the Hugoton field does not constitute a denial of equal protection.

Conditions differ in the different fields. In many of them, there is no necessity or occasion for such an order; and it is competent for the Commission to deal with each field according to the conditions prevailing in it. Classification based upon differences in conditions is not violative of the equal protection clause. In the two cases of *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 and 311 U. S. 570, the orders of the Texas Commission applied only to the East Texas field, and in *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, the order was applicable only in the Oklahoma City field. That was because those were the only fields in which the conditions required such orders at that time. And those orders were upheld by this Court.

The statute (Appendix C, Sec. 239) authorized the Commission "to regulate the taking of natural gas from *any* or all such common sources of supply within the State." That did not require that every order be applicable to every field, regardless of circumstances and conditions. The depths at which gas is found in the different fields in Oklahoma vary from 500 to 12,000 feet. The volumes and pressures vary as do the size and economic value of the pools themselves. Competitive conditions exist in some and not in others. The Commission deals with those questions from time to time, and is familiar with the regulatory problems of the common sources of supply in the State.

Peculiarly appropriate, therefore, is JUSTICE RUTLEDGE'S statement in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 98, as follows:

> "For we have constantly recognized the propriety of allowing wide discretion to the administrative agencies who are best qualified to select the most reasonable solutions to the thorny problems that accompany regulation in this highly technical field. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573."

The order is presumed to be valid. "Every possible presumption is in favor of its validity" (*Nebbia* v. *New York*, 291 U. S. 502, 537). The burden, therefore, is upon defendant to show that it is not. That means that, as relates to a denial of equal protection because the order is applicable in only one field, the burden is upon appellant to show that the conditions in other fields are so like those in the Hugoton field as to require the same order, and appellant has not attempted to do so. The record contains no evidence as to conditions in other fields in comparison with those prevailing in the Hugoton field.

(d) The statutes and orders do not take appellant's property without compensation, and do not give it to appellee without any justifying public purpose or due reciprocity of advantage.

Far from taking appellant's property without compensation, the purpose and effect of the statutes and orders are to prevent appellant from taking appellee's property without just compensation. And the public purpose and

reciprocity of advantage of the statute and orders are evident.

We think we have sufficiently answered that contention in our discussion of the constitutionality of the statutes and orders under the heading "In General."

(e) The statutes are not ambiguous, and the judgment of the Supreme Court upholding the orders is not arbitrary.

We have already shown that neither the statutes nor the orders are ambiguous, and if they were, that would render them, not void, but only subject to construction by the State Supreme Court.

And that Court's adjudication that appellant is a common purchaser, and that the 1915 Act (Appendix C, Sec. 240) authorizing the Commission to make regulations for the "equitable purchasing of gas" empowered it to fix the price, is not unreasonable or arbitrary. There can be no purchase without a price, and an order requiring one to purchase without fixing the price is nugatory if the purchaser and seller cannot agree upon a price.

(f) The statute is not void for failure to provide a standard of policy to guide the Commission in fixing the price. It grants the Commission no arbitrary power in that respect.

There is implicit in the statute the requirement that the price fixed shall be reasonable. For example, construed literally, the Sherman Act prohibits all restraints of trade; but this Court held that it was to be interpreted in the light of reason, and that it prohibited only unreasonable or undue restraint (*The Standard Oil Co. v. United States,*

221 U. S. 1). In short, the Court found in the act the legislative intent that the restraint prohibited should be the converse of reasonable. In this case the statute uses the word "equitable", which means fair and reasonable, and, to insure the fairness and reasonableness of the price fixed, it grants an appeal to the State Supreme Court. The constitutions of Virginia and Oklahoma, in granting their commissions power to regulate rates, provide only that the rates fixed shall be "reasonable and just" (Okla. Const., Art. IX, Sec. 18). The regulatory provisions of those constitutions have come under the scrutiny of this Court (*Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Oklahoma Natural Gas Co.* v. *Russell et al.*, 261 U. S. 290), but neither it nor any other court has ever held that the standard prescribed was not sufficient or that the power conferred was arbitrary.

In *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 230, the statute created a Board of Censors and empowered it to prohibit the showing of any films except those "of a moral, educational or amusing or harmless character", and this Court sustained it as against the contention that it furnished no standard by which to determine what constituted moral, educational, or amusing or harmless character, and therefore left the matter to the arbitrary judgment or caprice of the Commission.

In *Mahler* v. *Eby*, 264 U. S. 32, this Court, passing upon a statute authorizing the deportation of "undesirable aliens", held that those words were "sufficiently definite to make the delegation quite within the power of Congress."

In *Federal Radio Commission* v. *Nelson Bros. Bond &*

Mtg. Co., 269 U. S. 266, the Court sustained the Act of Congress providing that licenses should be granted "as public convenience, interests or necessity requires" as against a contention that it set up a standard so indefinite as to confer an unlimited power.

In *Bowles* v. *Willingham*, 321 U. S. 503, this Court held that the rent control provision of the Price Control Act provided a sufficient standard for its administration. It held that it was not unconstitutional because the act provided merely that the rents fixed should be "generally fair and equitable", and that the fact that there was a zone for the exercise of the board's discretion did not invalidate the act.

In *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, the statute prohibited the "unreasonable" waste of gas, and this Court held that sufficiently prescribed the standard.

(g) The price and basis of measurement fixed by the orders do not apply retroactively.

The orders were not retroactive. Made on December 9, 1946, they did not become effective until January 1, 1947. The orders themselves, therefore, affected appellant only from and after the latter date.

It may be that appellant will be required to pay Peerless for the gas taken from the latter from and after July 9, 1946, at the price fixed by the orders; but, if so, that will result, not from the orders' compulsion, but from the written stipulation entered into between appellant and Peerless on that date, providing that appellant would connect with Peerless' wells without prejudice to the final

determination of the proceeding, and would pay for the gas taken whatever price should be finally and validly fixed (211). If, therefore, appellant is required to pay for that gas the price fixed in the orders, it will be only because it contracted to do so.

(h) The proceeding resulting in the orders was legislative and not judicial in character.

In its Assignments II(c) and III(c) appellant refers to the proceeding as judicial in character and claims invalidity on that account. Also, before answering, it filed a motion stating that the proceeding to fix price and measurement was judicial in character, to which the Commission's general rules of procedure were not applicable; that no statute prescribed the procedure in such cases, and that it was in doubt what rules would be applied; and it moved that the Commission, in advance of the hearing, advise it what rules of practice and procedure would be applied (44).

Upon presentation of the motion, the Commission stated that it would answer the question raised if and when it became necessary in the trial (64); and, in addition to the assignments above, appellant assigns that due process was denied it by consolidating judicial and legislative proceedings, and refusing to inform it in advance of the rules of procedure to be applied in the former.

Even if the proceeding were both legislative and judicial in character, there is nothing in the Constitution of the United States that would prevent their consolidation for hearing.

But the proceeding before the Commission was wholly legislative and in no respect judicial in character. It sought the fixing of the price and measurement of gas in the Hugoton field, and measurement is an element of price. The fixing of a price at which a commodity shall be purchased or sold is a legislative and not a judicial act. It could have been done by direct act of the Legislature, and, if so done, no one would say that it was judicial in character. The orders are laws and not judgments. The Oklahoma Supreme Court held the proceeding legislative. It said:

> "The orders are legislative in character and subject in a large measure to the rules and principles by which the validity of statutes are determined. In the hearings preceding the orders, and not for violations thereof, the rules and principles of procedure obtaining in the enactment of a statute more nearly apply than the strict rules applicable to law courts."

And in *Grand Trunk Western Ry. Co.* v. *Railroad Commission*, 221 U. S. 400, this Court said that an order of the Indiana Commission is a legislative act by an instrumentality of the state exercising delegated authority, is of the same force as if made by the legislature, and so is a law of the state. See also to the same effect *Louisville & N. Ry. Co. v. Garrett et al.*, 231 U. S. 298, 305; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Lake Erie and Western R. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424; *King Mfg. Co.* v. *City of Augusta*, 277 U. S. 100, 112.

The orders adjudged no liability on past facts. They looked only to the future, and prescribed a rule of action to be observed thereafter.

While the Commission acts judicially in enforcing its orders, the orders themselves are legislative in character. In making them it sits as a legislative or administrative body. It is only in proceedings to enforce them that it acts judicially.

In *Prentis* v. *Atlantic Coast Line Ry. Co.*, 211 U. S. 210, this Court, speaking through JUSTICE HOLMES, defined and distinguished judicial and legislative proceedings in the following language, which has been quoted and applied by courts innumerable:

> "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Virginia 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others* v. *Commonwealth*, 106 Virginia, 264, 281. See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440.

"Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed sub. nom. *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. Sec. 709, and Act of February 18, 1875, ch. 80, 18 Stat. 318. See *Upsher County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*, 204 U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up."

The order in that case had fixed railway rates for carrying passengers. Where the state has power to fix the price at which an article shall be bought or sold, its action in doing so is not different in character from that of fixing a rate. Railroad rates are the prices for transportation; and, if fixing them is a legislative act, then the fixing of a price for a commodity is also a legislative act. Such an act does not "enforce liabilities as they stand on present or past facts", but it "looks to the future, and changes existing conditions by making a new rule to be applied thereafter." "The establishment of a rate (price) is the making of a

rule for the future, and therefore is an act legislative, not judicial, in kind."

There was, therefore, no mingling of judicial and legislative proceedings in this case. There was no judicial proceeding; and the Commission had adopted, promulgated and printed its rules of practice and procedure in legislative proceedings.

The action of the State Supreme Court, however, refusing to annul or vacate the order, was judicial in character (Okla. Const., Art. IX, Sec. 20). The appeal was the equivalent of and a substitute for an independent suit to test the validity of the orders (*Federal Radio Commission* v. *Nelson Bros. Bond & Mtg. Co.*, 289 U. S. 266).

But, even if the proceeding before the Commission had been judicial, Sec. 18, Art. IX, Okla. Const., and Title 17, Okla. Stat. 1941, and numerous decisions of the Supreme Court of the State had defined the rules of procedure. Thus, in *St. Louis & S. F. Ry. Co.* v. *C. H. Cannon & Son*, 31 Okla. 476, the Court held that when the Commission sits as a court its proceedings are governed by the same rules that obtain in courts of justice. The constitution, statutes and decisions require notice, give the right to appear and defend, to have compulsory process for witnesses, to examine and cross-examine witnesses, and to be heard by counsel orally and by brief; and they require that the Commission's orders be consonant with the Constitutions of the United States and the State and with the State's laws. Such a proceeding affords due process.

Furthermore, nothing in the proceeding is pointed out as constituting a practice unknown to or which could not

have been anticipated by Cities. So far as the record shows, the matter complained of is a mere formality, wholly without effect upon the trial.

(i) The statutes and orders do not require appellant to discriminate as to price and measurement in favor of Peerless and against other sellers in the field, in that the orders are leveled solely at appellant and require it to pay a higher price than is being paid by it under existing contracts with other sellers, as alleged.

Far from requiring appellant to discriminate as between producers in the field, the effect of the orders and one of their purposes are to prevent such discrimination. Appellant was already discriminating as between producers, both in its taking of gas and in the prices it paid. It took the gas from some and refused to take it from others, and it paid a different price to the various sellers.

The general order, No. 19514, is intended to end that. It requires purchasers to pay the same price upon the same basis of measurement, and thus not only prevents appellant and other purchasers from discriminating as between sellers, but it makes the same requirement of all purchasers, and thus prevents discrimination as against appellant.

(j) Under the circumstances the state has power to fix a minimum price for gas in the Hugoton Field, and the fact that appellant has contracts for the purchase of gas at prices different from that fixed does not prevent the exercise of that power.

It will be observed that appellant does not invoke the contract clause of the Constitution. Its Assignment II(d) with reference to its contracts is only that the statutes and orders discriminate against it in that they require it to pay a price for gas higher than it is currently paying under existing contracts, and therefore take its property without compensation and give it to sellers without any justifying public purpose or reciprocity of advantage. That assignment invokes only the due process and equal protection clauses.

Under its police power, for the purpose of conserving the gas supply, protecting the correlative rights of producers, and for the general welfare, and under the circumstances existing here the State has power to fix the price of gas in the field. Of course, it cannot fix prices aimlessly or arbitrarily. But, where the commodity is an important natural resource of the State, and the manner of its taking and the prices paid for it are matters of public concern affecting large bodies of its citizens, is inextricably linked with conservation and the protection of correlative rights, and the taker is a common purchaser, under the decisions of this Court there can be no question of the State's power to fix the price.

In *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 89, this Court sustained a statute fixing insurance rates,

and held that the business by circumstances and its nature had risen from private to public concern and had consequently become subject to governmental regulation. To the same effect is *National Union Fire Ins. Co. v. Wanberg*, 260 U. S. 71.

Nebbia v. New York, 291 U. S. 502, sustained a statute and order fixing the price of milk. Therein this Court said:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Further on it said:

> "The court has repeatedly sustained curtailment of enjoyment of private property in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."

Again it said:

> "The constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency."

It said that the dairy industry was not, in the accepted sense of the phrase, a public utility; but that the conditions

under which milk was sold at wholesale and retail affected the community at large and were of public consequence, and that the business was therefore subject to regulation; that the private character of a business does not necessarily remove it from the regulation of charges or prices. It said that "There is no closed class or category of business affected with a public interest", and that the function of the courts is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exercise of governmental authority or condemn it as arbitrary or discriminatory.

In *Mayo, Commissioner* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, this Court said:

> "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it; and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal."

In *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, this Court sustained a statute of Pennsylvania which required dealers in milk to obtain licenses, to give security for payment of purchases from producers, and to pay the producers not less than a minimum price prescribed by an administrative agency; and it sustained that statute as applied to a dealer who purchased milk from neighboring farms which he shipped to another state for sale. The Court held that the purpose of the statute was to reach a domestic situation in the interests of the welfare of the producers and consumers of milk in Pennsylvania.

Again in *United States* v. *Rock Royal Co-op, Inc.*, 307 U. S. 533, this Court sustained an order of the Secretary of Agriculture made under the Agricultural Marketing Agreement Act of 1937, fixing and equalizing minimum prices to be paid producers for milk sold to dealers in interstate or foreign commerce.

And in *Parker, Director of Agriculture* v. *Brown*, 317 U. S. 341, this Court sustained a statute of California and and administratve order made under it fixing the price of raisins for the purpose of "conserving the agricultural wealth of the state" and "preventing economic waste in the marketing of agricultural products."

In *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394, this Court said:

> "Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the states *(Nebbia* v. *New York*, 291 U. S. 502) and to the Congress *(United States* v. *Rock Royal Co-op, Inc., supra)* in their respective domains *(Baldwin* v. *G. A. F. Selig, Inc.*, 294 U. S. 511) for the protection and promotion of the welfare of the economy."

There are other decisions to the same effect, but the foregoing are sufficient. They sustain the proposition that, if the fixing of a price is a reasonable means of effectuating a policy which the state has power to adopt, then it has the right to fix it, and that the wisdom of the policy rests with the legislature and is not subject to review by the courts.

Oklahoma's policy is shown, not only by the statutes

set forth in the appendices, but also by Okla. Stat. 1941, Title 79, Sec. 4, which was enacted in 1910 and is as follows:

> "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this Article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

The power to require ratable taking implies and includes the power to fix the price, otherwise the requirement is satisfied if the taker takes the gas without paying any compensation for it. Or he can offer a mere pittance for it, and say that he is not taking it because its owner refuses to let him have it for the pittance.

Of course, there are limitations as to the price to be fixed. It may be fixed so high or so low as to constitute a deprivation of property without due process, and thus offend the 14th Amendment. But it is not assigned that

the price fixed is so high as to constitute a deprivation of property; it is only contended that the Commission cannot fix a price at all.

Moreover, the existing price in the field cannot be the criterion when that price is a non-competitive one fixed by the taker himself, any more than the rate base of a public utility can be fixed upon the basis of earnings produced by unregulated and excessive rates (*Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 305).

(k) Appellant's contracts do not render it immune from regulation.

If the state otherwise has power to fix a minimum price for the gas, then the fact that appellant has contracts that will be affected does not prevent the exercise of the power. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter" (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 357).

In contracting the parties are charged with knowledge of the law and with the possibility of the state's exercising its power thereunder, and of the fact that when it does so, the contracts must give way. Appellant knew that, and its contracts were expressly made subject to the exercise of that power. They contain provisions to the following effect:

> "All the provisions of this contract are subject to all valid legislation, State or Federal, with respect to the subject matter hereof, and to all valid present and future gas proration and other applicable orders, rules

and regulations of duly constituted authorities having jurisdiction" (795, 802; 713, 732; 695, 711; 618, 635).

See *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109.

In *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, the railway company had contracted to give Mottley a free pass for life in settlement of an action for personal injury. Subsequently Congress forbade the issuance of free passes, whereupon the railway refused to renew Mottley's pass, and he sued to compel it to do so. This Court held that the contract, though valid when made, "must necessarily be regarded as * * * made subject to the possibility that, at some future time, Congress might so assert its whole constitutional power in regulating interstate commerce as to render the agreement unenforcible or to impair its value. That the exercise of the power might be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable." See also *United States* v. *B. & O. R. Co.*, 333 U. S. 169, 175; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 613-14.

In *Henderson Co.* v. *Thompson*, 300 U. S. 256, this Court held valid a Texas statute forbidding the use of sweet gas for the manufacture of carbon black, and held that the effect of the statute upon contracts of the company for the purchase of sweet gas from producers for carbon black purposes was merely incidental, and did not violate the constitution.

See also *Atlantic Coast Line Ry. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372; *Stephenson* v. *Binford*, 287 U. S.

251, 276; *Sproles* v. *Binford*, 286 U. S. 374, 390; *Sutter Butte Canal Co.* v. *Railroad Commission*, 279 U. S. 125, 137-39; *Producers' Transportation Co.* v. *Railroad Commission*, 251 U. S. 228.

(l) The hearing was fair and impartial and did not deny appellant due process of law.

We have already noticed the complaint that the Commission erroneously consolidated judicial and legislative proceedings, and have shown that the only proceeding before it was legislative in character, and that, even if it were not, the consolidation of legislative and judicial matters in the proceeding raises no federal question.

As to the Commission's alleged refusal to inform appellant in advance of the rules and practices of procedure to be followed, those rules had been printed and published, and the appearance of appellant's attorneys in the cause implied that they were familiar with them, as it was their duty to be.

Allowing the Commissioners of the Land Office to file an intervening petition and consolidating it with the proceeding upon Peerless' petition, and allowing the Commission's conservation attorney to participate in the proceeding, were within the Commission's power and discretion. Since the State owned large bodies of land in the Hugoton field which were under the control of the Commissioners of the Land Office, it was proper to permit the latter to intervene and to participate in the proceeding; and since one purpose of the proceeding was the conservation of gas, it was the right and duty of the conservation attorney to participate in it.

It is not true that the Commission allowed a private citizen to make an unsworn statement to it during the proceeding. The reference is to H. W. Long, and the record shows that he was duly sworn (97-98), and was cross-examined at length (107-112). Also, the proceeding was a legislative and not a judicial one.

As to the statement that the Commission wrongfully conducted a plebiscite of land and royalty owners during the proceeding, the facts were these: The Texas County Land & Royalty Owners Association sought to file an intervening petition in the cause, and appellant itself read the petition to the Commission and objected to its filing on the ground that the genuineness of the signatures to it had not been shown. It was then stated that the members of the Association were present, whereupon each was called and was asked only if he had signed the petition, and he answered that he had (111-117). Since they had the right to file an independent proceeding, there was nothing wrong in admitting them to participate in the pending one.

But even if the Commission had conducted a plebiscite, that would not have invalidated its order. That very thing was done by the Secretary of Agriculture in *United States v. Rock Royal Co-op., Inc.*, 307 U. S. 533, before promulgating an order fixing the price of milk, and this Court held that it was authorized by the act and was not unreasonable.

Furthermore, in a legislative proceeding such as this was, the strict rules governing judicial hearings do not apply.

(m) The price fixed is not unreasonable or excessive.

As stated above, appellant has not assigned that it is. Nevertheless, we feel that we should point out briefly the facts affirmatively showing its reasonableness. The following facts were shown without dispute:

Gas in the Hugoton field, in comparison with coal at various mines in Oklahoma, is worth from 14.73 to 27 cents per MCF, and compared with oil it is worth 20 cents per MCF (190-91).

Ever since 1916 the price of gas from all wells in the Osage Nation under the jurisdiction of the Secretary of the Interior has been 18 cents per M at the well, measured at 10-oz. above atmospheric pressure (200), and appellant buys gas therein at that price (202). That is 11 cents per M greater than the 7 cents price fixed by the Commission.

Appellant itself buys gas from Anderson-Prichard Oil Corporation at 7 cents per M (201-02). Hazel-Atlas Co. at Ada pays 11 cents per M for gas (106-07).

Cities has made contracts with Harrington & Marsh, Magnolia Petroleum Company and Stanolind Oil & Gas Company to purchase their gas in the Hugoton field and to pay 6 cents per M therefor (410).

It must be evident, therefore, that a price of 7 cents per MCF is not so excessive as to constitute a deprivation of property. A corporation that pays from 6 to 18 cents per M for gas at the wellhead will hardly be heard to say that 7 cents is an excessive price; and, as stated, appellant has not assigned that it is.

V.

The statutes and orders are not violative of the commerce clause.

As we view the case, there is no question of interstate commerce in it. It is true that a part of appellant's business is the transportation and sale of gas in interstate commerce; but that is only a part of it, and is not the part at which the statutes and orders are aimed. Appellant is also engaged in intrastate business. It owns gas leases in the State, it operates them, it purchases gas in the State, and it sells gas therein. And the statutes and orders are intended to regulate appellant's production from its own wells, to forbid it to drain its neighbors' lands, and to that end to require it to purchase from them ratably at a reasonable price or close its own wells. The statutes and orders are not aimed at interstate commerce and do not discriminate against it. They are applicable to all producers and purchasers regardless of what they do or intend to do with the gas.

All of appellant's actions here sought to be regulated are local in character; and the power of the State to protect its inhabitants in the ownership and enjoyment of their property and to prevent the waste of its natural resources is undoubted, and is not limited by the commerce clause of the constitution.

In *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, the appellant made the same contention but this Court said:

"Such production is essentially a mining operation and therefore is not a part of interstate commerce

> even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178. *Hope Gas Co.* v. *Hall*, 274 U. S. 284, 288. *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10. *Utah Power & Light Co.* v. *Pfost, supra*. No violation of the commerce clause is shown."

The commerce clause is not a shield for theft. It affords no protection to a wrongdoer who seeks unlawfully to appropriate another's property with the intent to ship it in interstate commerce; and the owner can replevy it, though it be under an interstate bill of lading or even in transit. Before one can lawfully put in interstate commerce an article under the jurisdiction of the state and claim immunity from state laws with respect to it, he must have lawfully acquired ownership of the property under the state's laws. That is antecedent to interstate commerce. Since the gas underlies lands in the state and is the property of the landowners, the state laws govern the passing of title to it and the relation between the owner and taker of it. And the state has power to prohibit one from appropriating it without just compensation, even though the would-be appropriator intends to ship it in interstate commerce.

In Note 31 to Justice Rutledge's opinion in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 95, he said:

> "Oklahoma can prevent agents of Republic from going on Peerless' land by force of arms and there drilling a well and stealing gas. The state's power to prevent larceny and trespass and to enjoin any use of property that creates a nuisance for a neighboring property owner also justifies the regulation of com-

mon property for the mutual advantage of its several owners. *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Bacon* v. *Walker*, 204 U. S. 311."

And it is significant that Okla. Stat., Title 52, Sec. 235, being a part of the 1913 Act set forth in Appendix A but not copied therein, provides:

> "Any person or agent of a corporation, who takes gas, or aids or abets in the taking of gas, except as herein provided, * * * shall be guilty of grand larceny."

Appellant contends that the statutes and orders conflict with the Natural Gas Act of 1938 (52 Stat. 821), and therefore must fall. But that is not true. If that Act is applicable to the matters here involved, then it invades in that respect the reserved powers of the state, and thereby violates the 10th Amendment. But there is no conflict.

The intention of Congress, in regulating interstate commerce, to exclude the states from asserting their police power must be clearly manifested (*Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases there cited; *Kelly* v. *Washington*, 302 U. S. 1, 10; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85; *Maurer* v. *Hamilton*, 309 U. S. 598, 614; *Watson* v. *Buck*, 313 U. S. 387).

Not only does the Natural Gas Act not manifest such intention, but the act itself and the committee reports show their intent and scrupulous care to preserve in the states

all the rights and powers they previously had. Thus, Section I(b) of the act provides:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

And in the House Committee Report it was stated that the purpose of the act was "to occupy this field in which the Supreme Court has held that the states may not act", and that "*The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory authority* * * *."

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 501, 612, this Court said:

> "As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions, and the Federal Power Commission was given no authority over 'the production or gathering of natural gas'. In addition Congress recognized the legitimate interests of the states in the conservation of natural gas."

Further on it said (p. 614):

> "It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state *either to safeguard its tax reve-*

nues from that industry or to protect the interests of those who sell their gas to the interstate operator. The return which the Commission allowed was the net return after all such charges."

And, in *Interstate Gas Company* v. *Federal Power Commission*, 331 U. S. 682, this Court said:

"Clearly, among the powers thus reserved to the states is the power *to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern.* It was the intention of Congress to give the states full freedom in these matters. *Thus, where sales, though technically cosummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the state of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.*"

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 517, this Court said that the Natural Gas Act, though extending federal regulation, "had no purpose or effect to cut down state power" and that "the act was drawn with meticulous regard for the continued exercise of state power, *not to handicap or dilute it in any way.*"

Further on (p. 519) this Court said: "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach"; and on page 520 it said that the Natural Gas Act "created an articulate legislative program based on a clear

recognition of the respective responsibilities of the federal and state regulatory agencies", without in any manner usurping the latter's authority.

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, this Court held that under the Natural Gas Act the sale and transfer of gas leases by an interstate pipe line company was subject to state regulation and control and outside the scope of the Federal Power Commission's regulatory powers, notwithstanding the facts that gas from those leases was being transported in the interstate pipe line and that the leases themselves were listed to justify the issuance of a certificate of convenience and necessity.

It follows, therefore, that the provisions of the Natural Gas Act and the authority of the Federal Power Commission do not impinge upon the power of the state and its regulatory agencies, but take up where the latters' powers end.

In *Parker, Director of Agriculture* v. *Brown*, 317 U. S. 341, the Director of Agriculture, acting under the California Agricultural Prorate Act having the expressed purpose of "*conserving the agricultural wealth of the state*" and "*preventing economic waste in the marketing of agricultural products*" therein, had fixed the price of raisins which, after purchase, were to be shipped in interstate commerce; and this Court sustained the act and the order. Once more we quote at length. In the opinion (pp. 359-61) it said:

> "The governments of the states are sovereign within their territory save only as they are subject to

the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate* Cases, 230 U. S. 352, 399-400; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187, *et seq.; California* v. *Thompson,* 313 U. S. 109, 113-14 and cases cited; *Duckworth* v. *Arkansas,* 314 U. S. 390. *A fortiori* there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power.

"In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21 and cases cited; *Minnesota* v. *Blasius,* 290 U. S. 1 and cases cited) this Court has frequently held that for purposes of local taxation or regulation 'manufacture' is not interstate commerce even though the manufac-

turing process is of slight extent. *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Hope Gas Co.* v. *Hall*, 274 U. S. 284; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd* v. *Pearson*, 128 U. S. 1; *Champlin Refining Co.* v. *Commission*, *supra; Sligh* v. *Kirkwood*, 237 U. S. 52; see *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 245; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 77; cf. *Bayside Fish Co.* v. *Gentry*, *supra*. A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. *Chassaniol* v. *Greenwood*, 291 U. S. 584. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

"All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce."

Peerless and other local producers whose interests are intended to be protected are not engaged in interstate commerce; and applicable to such situation this Court, in *Parker* v. *Brown*, *supra*, said (pp. 362-363):

> "This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (with which compare *California* v. *Thompson*, *supra*); *South Carolina Highway Dept.* v. *Barnwell Bros.*, *supra*; *Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504-5.
>
> "Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo* v. *Pennsylvania*, *supra*; cf. *Wickard* v. *Filburn*, *supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears

that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases, supra*, 398-412; *California* v. *Thompson, supra*, 113."

Further on this Court said:

"This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsist Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. *Kidd* v. *Pearson, supra; Sligh* v. *Kirkwood, supra; Champlin Refining Co.* v. *Commission, supra; South Carolina Highway Dept.* v. *Barnwell Bros., supra*, and cases cited at p. 189 and notes 4 and 5; *California* v. *Thompson, supra*, 113-15, and cases cited."

In *Republic Natural Gas Company* v. *Oklahoma*, 334 U. S. 62, Republic was engaged in producing gas in Oklahoma and transporting the same into Kansas and there selling it; and it is significant that no member of the Court expressed the thought that the order was void on that account.

We think it can be shown that, if the statute and order have any effect upon interstate commerce, such effect is only incidental and indirect and does not render the order void. Also, many other authorities can be cited, but we think the foregoing sufficient.

Respectfully submitted,

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APPENDIX

APPENDIX A

Act of 1913,
Oklahoma Statutes 1941,
Title 52, Sections 231-233

231—"All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners or gas lessees of the surface under which gas is located in its original state."

232—"Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well."

233—"Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said own-

ers and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas."

APPENDIX B

Act of 1913,
Oklahoma Statutes 1941, Title 52,
Sections 23, 24 and 25.

23—"Every corporation, joint stock company, limited copartnership, partnership or other person, now or hereafter claiming or exercising the right to carry or transport natural gas by pipe line or pipe lines, for hire, compensation, or otherwise, within the limits of this state, is allowed by, and upon compliance with the requirements of this act, as owner, lessee, licensee, or by virtue of any other right or claim, which is now engaged or hereafter shall engage in the business of purchasing natural gas shall be a common purchaser thereof, and shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another, and shall fully perform all the duties of a common purchaser; but if it shall be unable to perform the same, or be legally excused from purchasing and transporting all the natural gas produced or offered, then it shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons; and in the event it is likewise a producer, it is hereby prohibited from discrimination in favor of its own

production, or production in which it may be interested directly or indirectly in whole or in part, and its own production shall be treated as that of any other person or producer. All persons, firms, associations, and corporations are exempted from the provisions of this act, except from the provisions of section (9) hereof, where the nature and extent of their business is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence, and for this purpose the district courts of the state and the Corporation Commission are hereby vested with jurisdiction to determine such exemptions in any action or proceeding properly before them, and provided by the laws now in force in this state regulating the purchase and transportation of oil."

24—"Every corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter engaged in the business of carrying or transporting natural gas for hire, for compensation or otherwise, by pipe line, or pipe lines within this State, and by virtue of and in conformity to, any valid law incapable of revocation by any law of this sate or of the United States, or by virtue of and in conformity of the provisions of this Act, shall be a common carrier thereof as at common law, and no such common carriers shall allow or be guilty of any unjust or any unlawful discrimination, directly or indirectly, in favor of the carriage, transportation or delivery of any natural gas, offered to it, in its possession or control, or in which it may be interested, directly or indirectly, and, provided further, that any person, firm or corporation owning or operating a gas pipe line within the limits of any incorporated city or town in this state shall be exempted from the provisions of this section only as to its distributing lines located wholly within the corporate limits of said city or town."

25—"It shall be unlawful for any corporation, joint stock company, limited copartnership, partnership or other

person, now or hereafter engaged in the business of carrying or transporting natural gas for hire or compensation or otherwise, within the limits of this act and not becoming a common purchaser as defined by, and accepting the provisions of this act, to own or operate, directly or indirectly, any gas well or wells, gas leases, or gas holdings or interests in this state, after six months next after the approval of this act, and each and every of said corporations, joint stock company, limited copartnership, partnership or other persons shall divest themselves of all legal or equitable ownership, interest or control, directly or indirectly, in gas well or wells, gas leases or gas holdings or interest in this state."

APPENDIX C

Act of 1915,
Oklahoma Statutes 1941, Title 52,
Sections 239 and 240.

239—"Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow

of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another."

240—"Every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another, save as authorized by the Corporation Commission after due notice and hearing; but if any such person, firm or corporation, shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such production bears to the total production available for marketing. The Corporation Commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing, from the duty of purchasing gas of an inferior quality or grade."